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In The

Supreme Court of the United States

October Term, 1996

THE DAILY NEWS OF LOS ANGELES,
A DIVISION OF COOKE MEDIA GROUP, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

LOS ANGELES NEWSPAPER GUILD,
LOCAL 69, AFL-CIO,

Intervenor.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the decision of the court of appeals, which holds that an employer who has previously granted discretionary wage increases to its employees must continue to grant discretionary increases in order to preserve the status quo terms and conditions of employment following certification of a collective bargaining representative, conflict with this Court's opinion in *NLRB v. Katz*, 369 U.S. 736 (1962)?

2. Does the decision of the court of appeals, which forces the employer to agree to the demand of the employees' bargaining representative for either the continuance or discontinuance of discretionary wage increases, conflict with the fundamental principles of federal labor law articulated in this Court's decision in *NLRB v. American National Insurance Company*, 343 U.S. 395 (1952), by compelling a party to make concessions on a bargainable subject?

LIST OF PARTIES TO THE PROCEEDING PURSUANT TO RULES 14(1)(b) AND 29.6

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of this Petition for Writ of Certiorari.

Petitioner The Daily News of Los Angeles, a Division of Cooke Media Group, Inc. has the following parent company: Jack Kent Cooke, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The Daily News of Los Angeles, a Division of Cooke Media Group, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit on January 18, 1996, and the subsequent denial of the Petition for Rehearing on July 9, 1996.

CITATIONS TO OPINIONS OF THE COURT OF APPEALS AND AGENCY BELOW

The opinions and orders of the United States Court of Appeals for the District of Columbia Circuit and the National Labor Relations Board in this matter are as follows:

1. *Daily News of Los Angeles v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996). The opinion of the court of appeals is reproduced beginning at Appendix page 1a.

2. *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571 (D.C. Cir. 1992). The opinion of the court of appeals is reproduced beginning at Appendix page 59a.

3. *Daily News of Los Angeles*, 315 N.L.R.B. 1236 (1994). The supplemental decision and order of the NLRB is reproduced beginning at Appendix page 29a.

4. *Daily News of Los Angeles*, 304 N.L.R.B. 511 (1991). The decision and order of the NLRB

is reproduced beginning at Appendix page 76a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 18, 1996. 1a. The petition for rehearing and suggestion for rehearing *en banc* was denied by the court of appeals on July 9, 1996. 99a, 100a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

(a) National Labor Relations Act, section 8(a)(5), 29 U.S.C. § 158(a)(5):

> It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees. . . .

(b) National Labor Relations Act, section 8(d), 29 U.S.C. § 158(d):

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to the wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

STATEMENT OF THE CASE

This case presents the question of whether the United States Court of Appeals for the District of Columbia Circuit, while enforcing an order of the National Labor Relations Board ("NLRB" or "Board"), has decided an important question of law in a way which conflicts with the holding of this Court in *NLRB v. Katz*, 369 U.S. 736 (1962). The court of appeals ruled that an employer who has granted discretionary merit increases to some of its employees in the past must continue to grant discretionary increases in order to satisfy its obligation, under the National Labor Relations Act ("NLRA"), to preserve the status quo terms and conditions of employment during collective bargaining. 17a.

The petitioner, The Daily News of Los Angeles, a division of Cooke Media Group, Inc. ("Daily News"), exercised absolute discretion over who received increases and over what amounts, if any, an employee received. 88a. This exercise of discretion precludes those past increases from being established terms and conditions of employment, or the status quo, under *Katz*. In *Katz*, this Court ruled that an employer violated its obligation to bargain in good faith by granting discretionary increases to employees, holding that such discretionary increases constituted a *per se* unilateral change in the status quo. 369 U.S. at 746-47. The *Katz* Court specifically rejected the employer's argument that its discretionary increases were a regularly timed quarterly and semi-annual practice, and therefore an established condition of employment. 369 U.S. at 746.

The fallacy of the circuit court's decision is further exposed by its inconsistent definition of the status quo terms of employment. The present decision of the court of appeals, when viewed in conjunction with other cases, establishes a definition of the status quo which is constituted solely by the bargaining demand of the union. If a union demands a cessation of discretionary increases, then discretionary increases are not an established condition of employment under *Katz*. If a union demands further increases, the court below holds that the discretionary increases are transformed into an established term and the status quo which the employer must continue. The opinion of the court of appeals is fundamentally inconsistent with *Katz*, which held that it is the measure of discretion exercised by an employer in the granting or withholding of increases, not the demands of the employees' bargaining agent, which determines whether a series of past wage increases constitutes the status quo for purposes of applying the doctrine of unilateral change. 369 U.S. at 746-47.

Finally, by defining the status quo as the union's current bargaining demand, the Court below not only creates a rule which is inconsistent with *Katz*, but which also compels concessions on what is clearly a bargainable issue, in derogation of the fundamental principles of the National Labor Relations Act,[1] and this Court's holding in *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). The result of the court's decision below is not the preservation

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[1] 29 U.S.C. § 151 et seq.

of existing conditions mandated by *Katz*, but the simple transfer of bargaining power from one party to the other.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

In January 1986, the Daily News was acquired by Cooke Media Group, Inc. 2a. After it was acquired, the Daily News periodically reviewed the performance of each employee in the editorial department, usually on an annual basis.

Prior to the initiation of collective bargaining with the charging party in the NLRB proceeding, Los Angeles Newspaper Guild, The Newspaper Guild Local 69, AFL-CIO (the "Guild"), the Daily News granted increases in varying amounts to some editorial employees, at the discretion of management. The Board's initial finding that the Daily News exercised complete discretion over past increases is not contested. *Daily News of Los Angeles*, 304 N.L.R.B. 511 (1991) ("The amount of the increase, if any, is totally discretionary"). 88a.

In May 1989, the Guild was certified as the exclusive bargaining representative for the Daily News's editorial employees. 88a. In June 1989, the parties began negotiations on a collective bargaining agreement. 89a. The Guild demanded that the Daily News grant merit increases during negotiations, a demand the Daily News refused. 89a. The Guild filed an unfair labor practice charge with the NLRB, initiating the legal proceedings which culminated in the court's decision below.

CASE HISTORY AND BASIS FOR JURISDICTION OF THE COURT OF APPEALS

This petition involves a decision of the District of Columbia Circuit Court of Appeals enforcing a supplemental decision of the Board, finding that the Daily News violated Section 8(a)(5) of the NLRA by refusing the Guild's demand that the Daily News grant discretionary merit increases during contract negotiations. The court of appeals found that the Daily News's refusal to grant discretionary wage increases constituted a unilateral change in the conditions of employment, under the holding of *NLRB v. Katz*, 369 U.S. 736.

The Board's initial decision, *Daily News of Los Angeles*, 304 N.L.R.B. 511 (1991) (*"DNLA I"*), was challenged by the Daily News, which petitioned the District of Columbia Circuit Court of Appeals for review of the Board's order. 76a. The court of appeals granted the Daily News's petition in *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571 (D.C. Cir. 1992) (*"Daily News I"*). 59a. The court of appeals denied the Board's application for enforcement of its order, and remanded the case to the Board "for consideration of whether an employer is bound under *Katz* to persist in a merit raise that is entirely discretionary as to amount." 71a.

On December 30, 1994, the Board issued its supplemental decision and order, *Daily News of Los Angeles*, 315 N.L.R.B. 1236 (1994) (*"DNLA II"*). In *DNLA II*, the Board again found that the Daily News had violated the NLRA by refusing the Guild's demand to grant further increases. 29a. On January 19, 1995, the Daily News timely filed a petition for review of the Board's order in

DNLA II with the District of Columbia Circuit Court of Appeals, pursuant to 29 U.S.C. § 160(f). The Board filed a cross-application for enforcement of its order on February 8, 1995.

The court of appeals denied the Daily News's petition, and granted the Board's cross application for enforcement. *Daily News of Los Angeles v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996) (*"Daily News II"*). 1a. The court subsequently denied the Daily News's petition for rehearing and suggestion for rehearing *en banc*, on July 9, 1996. 99a, 100a. This petition is timely filed pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH SUPREME COURT PRECEDENT ON AN IMPORTANT ISSUE OF FEDERAL LABOR LAW.

This Court has long recognized the importance of federal labor law to the common good of this nation: "The importance of the area . . . makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

Decisions of this Court have served as cornerstones for many important structures in that "single body of

federal law." One of those decisions is *NLRB v. Katz*, 369 U.S. 736. This Court's decision in *Katz* articulated a fundamental principle of federal labor law embodied in the obligation to bargain in good faith imposed by the NLRA. Because the decision of the court of appeals ignores that fundamental principle, or applies it in a manner wholly inconsistent with *Katz*, this petition should be granted.

A. THE *KATZ* DECISION.

The principle articulated in *Katz* is the duty of the employer to maintain the status quo terms and conditions of employment, and to refrain from making unilateral changes in established conditions of employment, absent agreement or impasse with the employees' bargaining agent. This duty, *Katz* held, is derived from the obligation to bargain in good faith contained in Section 8(a)(5) of the NLRA.[2] In application, this Court held that wage increases which are determined at the discretion of an employer are not an established condition of employment, and that the granting of discretionary increases violates the employer's obligation to preserve the status quo.

While the NLRA contains general requirements of the obligation to bargain, such as the duty to "meet at reasonable times and confer in good faith," it is by no means exhaustive. 29 U.S.C. § 158(d). The *Katz* Court articulated a further principle implied from the duty to bargain in good faith:

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[2] 29 U.S.C. § 158(a)(5).

> We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) . . .

369 U.S. at 743. The court of appeals below found that the Daily News violated this duty to refrain from making a "unilateral change" by refusing the Guild's demand to grant additional discretionary increases during contract negotiations. 19a.

Katz, however, addressed the status of wage increases, and specifically the question of when a past series of wage increases becomes "established," and part of the status quo. *Katz* involved an employer who, while engaged in negotiations with a newly certified union, gave employees wage increases, without prior agreement with the union. 369 U.S. at 745-46. The Court was asked to decide whether this granting of increases was a refusal to bargain under the doctrine of "unilateral change" articulated above. The answer to this question, the Court held, hinged upon the critical factor of employer discretion.

The wage increases granted by the employer in *Katz* were "informed by a large measure of discretion" on the part of the employer. 369 U.S. at 746. The Court found that the element of discretion precluded the employer from claiming that the increases were an established practice, for where increases are discretionary, "[t]here is simply no way in such case for a union to know whether or not there has been a substantial departure from past practice." *Id.* *Katz* drew a sharp distinction between increases where the amount is based on set formulae or other objective factors, and increases where the amount is

based solely on the employer's discretion. Where increases are "automatic" based on factors outside an employer's control, they constitute an established practice. But where increases are discretionary, guided solely by the opinions of the employer, *Katz* held that they are not a "mere continuation of the status quo." *Id.*

The employer in *Katz* argued "that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews – in effect, were a mere continuation of the status quo. . . . " *Id.* In essence, the employer argued that the regular timing of the increases rendered them an established practice, and that the continued granting of discretionary increases was therefore consistent with its duty to preserve the status quo. The Court held, however, that the very element of discretion involved in the company's determination of the *amounts* of the increases precluded the company from claiming that the increases were an established, "long-standing practice," or "a mere continuation" of the status quo:

> Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here were in no sense automatic, but were informed by a large measure of discretion. *Id.*

The *Katz* Court rejected the argument that the regular timing of increases rendered them an established term of employment, or a continuation of the status quo.

B. THE COURT OF APPEALS' DECISION MISAPPLIES *KATZ*, AND ESTABLISHES DOCTRINE CONTRARY TO ITS HOLDING.

This matter presents the same question posed in *Katz*, namely whether a series of merit increases which are fixed as to timing, yet wholly discretionary as to amount, create an established term of employment, and part of the status quo which the employer is obligated to preserve. The only difference is that here the union, not the employer, seeks additional increases during bargaining.

In both this matter and *Katz*, the employer in the past gave merit raises, the amounts being discretionary. In *Katz*, the employer claimed that the regular timing of the discretionary increases, "the fact that the January raises were in line with company's long-standing practice," rendered them an established term of employment. 369 U.S. at 746. Here, paradoxically, it is the court of appeals and the Board which are asserting that the fixed timing of the admittedly discretionary increases renders them an established term and therefore part of the status quo. Both assert that the undisputed factual finding of the Administrative Law Judge that "[t]he amount of the increase, if any, is totally discretionary," is irrelevant to the determination of whether the increase is an established practice for purposes of applying *Katz*. *DNLA I*, 88a. The court of appeals describes the past increases as "an established merit increase program . . . but discretionary as to amount." *Daily News II*, 13a. The court concludes that "(even if the amount of each individual increase is discretionary), then *Katz* demands that the Company continue" to grant increases. 14a. This holding of the court of appeals cannot be reconciled with *Katz*, which held that

the discretionary nature of the increases therein absolutely precluded them from being a "mere continuation of the status quo," and that the granting of further discretionary increases constituted an alteration of the status quo. 369 U.S. at 746.

The Board's decision similarly opines that "we do not believe that these cases can be meaningfully distinguished on the basis that the range of merit raise discretion exercised by the employers was narrower than that exercised by" the Daily News. *DNLA II*, 43a. Yet in *Katz*, it was the very fact that the increases "were informed by a large measure of discretion" which led the Court to conclude that the increases could *not* be an established practice, and therefore were not a mere continuation of the status quo.

Other courts of appeals and the Board have, following *Katz*, found that a series of regularly timed, but discretionary wage increases are not an established, status quo condition of employment, in instances where the employer wished to continue to grant increases against the wishes of the union. As noted by a unanimous panel in *Daily News I*, "[i]n fact, the Board has treated such [discretionary wage increase] programs as lacking the character of an established practice, for purposes of rejecting both an employer's attempt to justify a unilateral grant of such increases and a union's attack on their discontinuance." 67a.[3] The dissent in the appellate

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[3] Previously, the courts of appeals also consistently have made the distinction between "discretionary" and "automatic" increases, following *Katz*. *See, e.g. Aaron Brothers Co. v. NLRB*, 661 F.2d 750, 753 (9th Cir. 1981) ("the Supreme Court has

court's most recent decision raised the same point. "If awarding such a raise does not continue the status quo [under *Katz*], I do not see how the raise can be 'a fixed condition or term of employment,' as the majority would have it." *Daily News II*, 26a (Henderson, J., dissenting).

The court of appeals below has, in its application, twisted the holding of *Katz* beyond recognition. *Katz* held that the amount of discretion exercised by the employer determined whether past increases were an established condition of employment, a "mere continuation of the status quo," which the employer could continue. Under the lower court's holding, the "total" discretion exercised by the employer is irrelevant to this determination. It is rather the bargaining demand of the union which determines the status quo. If the union demands that discretionary increases be continued, then they become an established condition of employment and a part of the status quo for application of *Katz*. If, on the other hand, the union wants the same discretionary increases to stop, they are "too indefinite," and therefore not an established

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counseled lower courts to examine the degree to which an employer has discretion to award a benefit or determine its size"); *NLRB v. John Zink Co.*, 551 F.2d 799 (10th Cir. 1977) ("the Court distinguished between automatic and discretionary increases"); *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1163 (5th Cir. 1976) (holding that where, "management discretion, rather than well established rules" determined increases, they were not a "mere continuation of the status quo under *Katz*"); *NLRB v. Ralph Printing*, 433 F.2d 1058, 1062 (8th Cir. 1970) (distinguishing increases granted pursuant to "a well-established company policy of granting certain increases at specific times," from "discretionary increases").

condition.[4] Under the court's ruling, the employer's rights and obligations with respect to maintaining the status quo are not decided by the amount of discretion it has exercised in the past, as *Katz* held they should be, but rather by the bargaining demands of the other party.

The decision of the court below poses a significant and ongoing risk to the integrity of the *Katz* doctrine. At least one other court of appeals has followed the court's decision in *Daily News II*. *See Pegasus Broadcasting v. NLRB*, 82 F.3d 511, 512 (1st Cir. 1996) ("we are in full accord with the recent similar case of *Daily News of Los Angeles v. NLRB*"). The Daily News respectfully requests that this Court issue a writ of certiorari to correct the distortion in the *Katz* doctrine caused by the decision of the court of appeals.

II. THE PETITION SHOULD BE GRANTED, BECAUSE THE LOWER COURT'S DECISION CREATES A CONFLICT BETWEEN THE CIRCUIT COURTS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

The decision of the circuit court, while conflicting with this Court's *Katz* decision, also creates a conflict between different circuits on the underlying issue.

The opinion of the District of Columbia Circuit directly conflicts with the holding of the Tenth Circuit in

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[4] *See, e.g. Oneita Knitting Mills*, 205 N.L.R.B. 500 (1973) (holding that employer's implementation of discretionary increases was an unlawful unilateral change under the *Katz* doctrine). *See also DNLA II*, 41a.

Phelps Dodge Mining Co. v. NLRB, 22 F.3d 1493 (10th Cir. 1994). In *Phelps Dodge*, the Tenth Circuit held that "[p]ayments to employees which are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectations and thus are not considered 'terms and conditions' of employment." *Id.* at 1496. The court in *Phelps Dodge* set aside an order of the Board which found that the company committed a unilateral change by denying to organized employees discretionary bonuses paid on a quarterly basis. The court based its decision on the employer's exercise of discretion over the amounts. "We find it significant that the payments were tied to unpredictable, and discretionary factors." 22 F.3d at 1498. Because "the company based the payments on unpredictable, discretionary factors, we do not find substantial evidence that the" payments were established " 'terms and conditions' of employment." *Id.*

Although quoted by the dissent, the majority in *Daily News II* does not even cite *Phelps Dodge*, and so does not even purport to distinguish the case or explain its different outcome. It merely ignores the conflicting opinion.

The court's decision in *Phelps Dodge* is a logical extension of previous court of appeals' decisions. Where raises have in the past been automatic, based on fixed criteria beyond the employer's control, courts have required the employer to continue the raises as an established practice. Where, on the other hand, the determining factors used in the increases are "indefinite" and have "followed no formula," they do "not become part of the compensation structure so as to require bargaining over their discontinuance." *NLRB v. Nello Pistoresi & Son, Inc.*, 500 F.2d 399, 400-01 (9th Cir. 1974) (holding that the discontinuance of

discretionary Christmas bonuses is not a violation of § 8(a)(5)). Accordingly, the Second and Seventh Circuits have held that where merit increases are determined on a discretionary basis, the employer may discontinue them. *Roper Corp. v. NLRB*, 712 F.2d 306 (7th Cir. 1983) (holding no 8(a)(5) violation where employer discontinued discretionary merit increases during course of negotiations with union); *NLRB v. Rochester Inst. of Technology*, 724 F.2d 9, 12 (2nd Cir. 1983) (holding that employer is not required to grant discretionary merit increases in order to maintain status quo).

The decision of the lower court herein also conflicts with other circuits which have held that discretionary increases based on subjective assessments of merit, as opposed to those based on formulae or other set factors, are not an established condition of employment or part of the status quo.[5]

Because the decision of the District of Columbia Circuit conflicts with decisions of the Tenth Circuit, and other circuits, and since the issue involved – the obligation to bargain – is an important "keystone" principle at the core of federal labor policy, the Daily News respectfully submits that its petition should be granted.

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[5] See footnote 3, *supra*, and the cases cited therein.

III. THE PETITION SHOULD BE GRANTED, SINCE THE LOWER COURT'S DECISION IMPERMISSIBLY FORCES CONCESSIONS ON A BARGAINABLE ISSUE, IN CONFLICT WITH THIS COURT'S PRECEDENT.

Under the holding of *Katz*, it is clear that an employer may not simply continue to grant discretionary increases to employees once a bargaining agent is certified to representative them. The granting of discretionary raises "must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8(a)(5)." 369 U.S. at 746. The court's decision below is wholly inconsistent with *Katz* in this regard. It states that the "Daily News was, therefore, required to continue its prior practice of making individualized determinations based on merit," which is exactly what *Katz* says the employer may not do. *Daily News II*, 17a.

The court of appeals holds, contrary to *Katz*, that an employer must continue discretionary raises during bargaining. Because of this fundamental misapplication, the court's opinion below makes no attempt to reconcile the internal contradiction between its opinion and *Katz*. The court does not address how an employer determines whether it must, under *Katz*, discontinue increases or, under the holding of *Daily News II*, continue them. The order which the court below is enforcing does address that subject, stating:

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases. . . . the implementation of that

> program . . . becomes a matter to which the bargaining agent is entitled to be consulted.

DNLA II, 41a, (quoting *Oneita Knitting Mills*, 205 N.L.R.B. 500, n.1 (1973)). In other words, the Board holds that discretionary increases become a bargainable issue once an employee bargaining agent is certified. This, at least, is consistent with *Katz*, which holds that if past raises are discretionary, the employer may not continue them, and "the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." 369 U.S. at 746-47.

If the subject of discretionary increases is, as *Katz* holds, a bargainable one, then the circuit court's decision plainly denies the Daily News its right to choose its bargaining position and the freedom to bargain with respect to that issue. If the bargaining agent demands further discretionary raises, *Daily News II* requires the employer to agree to that demand. *Katz* similarly requires discontinuance of raises should the bargaining agent demand that. In every instance, the Daily News must accede to the bargaining demand of the union. This violates the fundamental premise underlying the obligation to bargain, set forth in the NLRA and the decisions of this Court.

The substance of the obligation to bargain is set forth in section 8(d) of the NLRA.[6] Section 8(d) requires the parties to meet at reasonable times and in good faith, but permits the parties to choose opposite positions on any issue, and expressly provides that "such obligation [to

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[6] 29 U.S.C. § 158(d).

bargain] does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). Yet in order to conform with *Katz* and the lower court's decision in this matter, an employer who has granted discretionary increases in the past must, in recognition of the fact that the increases are now a bargainable issue, ask its employee's bargaining representative what its position is with respect to said increases: "the implementation of that program . . . becomes a matter as to which the bargaining agent is entitled to be consulted." *DNLA II*, 41a. Then the employer is required to immediately implement the union's bargaining demand.

Under *Daily News II*, then, the bargaining agent is entitled to more than mere "consultation." The employer must agree to whatever bargaining demand the union makes. The court of appeals has created a legal contradiction, a bargainable issue which compels one side, the employer, to concede to the other's demand in every instance.

This Court has confirmed that the Board does not have the power to craft a rule which compels an employer to agree to a demand on a bargainable issue: "it is equally clear that the Board may not, either directly or indirectly, compel concessions" upon parties to collective bargaining. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). The circuit court's holding is antithetical to the mandates of this Court and the NLRA. The ruling below empowers the union to force concessions on a bargainable issue, by creating a doctrine which defines the "established conditions" of employment and the status quo as synonymous with the union's current bargaining demand.

Because the decision of the court of appeals below forces concessions on a bargainable issue, in conflict with this Court's prior precedent, it is respectfully submitted that the Daily News's petition should be granted.

CONCLUSION

The decision of the court of appeals conflicts with established precedents of this Court. It affects the very definition of the obligation to bargain in good faith, which obligation lies at the core of federal labor law and its fundamental policy of achieving industrial peace through the free and orderly negotiation of differences.

The lower court's decision has already swayed one circuit to diverge from the path marked by this Court's *Katz* decision, in addition to creating a conflict with other circuits.

For all the reasons stated above, the Daily News prays that this Court grant a Writ of Certiorari to review the decision of United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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The Daily News of Los Angeles, a Division of Cooke Media Group, Inc.

DAILY NEWS OF LOS ANGELES, a Division of Cooke Media Group, Inc., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Los Angeles Newspaper Guild, Local 69, AFL-CIO, Intervenor.

No. 95-1047.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 6, 1995.

Decided Jan. 19, 1996.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Thomas P. Burke argued the cause, for petitioner, with whom Jamie L. Johnson was on the briefs.

David A. Fleischer, Senior Attorney, argued the cause, for respondent, with whom Linda R. Sher, Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, were on the brief. Paul J. Spielberg and Ellen Greenstone entered appearances.

Before: EDWARDS, Chief Judge, HENDERSON and ROGERS, Circuit Judges.

Opinion for the Court filed by Chief Judge EDWARDS.

Dissenting opinion filed by Circuit Judge HENDERSON.

HARRY T. EDWARDS, Chief Judge:

Between 1986, when the Daily News ("Company") purchased its daily newspaper operation, and 1989, when the National Labor Relations Board ("NLRB" or "Board") certified the Los Angeles Newspaper Guild, Local 69, AFL-CIO ("Guild" or "Union"), as the collective bargaining representative of the Company's editorial employees in Washington, D.C. and eight locations in California, the Company followed its predecessor's policy of giving annual merit increases to employees in the editorial department. However, following the Union's certification, the Company unilaterally decided to terminate its practice of granting merit increases. In response, the Guild filed a complaint with the NLRB.

The Board determined that the Daily News had unlawfully refused to bargain, in violation of section 8(a)(5) of the National Labor Relations Act ("NLRA" or "Act"),[1] by discontinuing the merit-increase policy without first negotiating to impasse with the Guild. The Board rejected the Company's argument that the wage increases were totally discretionary, and, therefore, could be terminated at any time. Instead, the Board ruled that the program of granting annual, merit-based wage increases based on performance evaluations had become a fixed term or condition of employment that could not be discontinued except pursuant to negotiations with the Union. On the basis of this finding of an unfair labor practice, the Board ordered the Daily News to award

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[1] 29 U.S.C. § 158(a)(5) (1988) states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . . "

employees back pay representing the difference between their current salaries and the approximate amount of their salaries absent the unlawful termination of the merit-increase policy.

On appeal, the Company contends that the Board's decision should be reversed because a discretionary program can never become a fixed term or condition of employment. However, the Company's argument is misguided in suggesting that a term or condition of employment can never be a mandatory subject of bargaining so long as it carries the appellation "discretionary." Indeed, the proper analysis in a case such as this one does not begin with the label assigned to a particular employee benefit, but, rather, with the character of the program at issue. Here, the Board found that the Company had an established practice of annually evaluating the *merit* of each employee based upon standard performance evaluations, and then determining an appropriate increase based only on the merit criterion. The program was in no sense whimsical, for each employee was assured an annual evaluation and a merit increase if his or her evaluation warranted it. The only discretion retained by the Company was with respect to the *amount* of the increases to be given to employees who earned good evaluations. Thus, the Board properly determined that the Company could not discontinue the entire program based on non-merit considerations, at least not without first negotiating with the Guild. Because there is substantial evidence in the record as a whole to support the Board's findings, and because we find no infirmity in the legal analysis underlying the Board's judgment, the Company's petition

for review is denied, and the Board's cross-application for enforcement is granted.

I. Background

A. *The Dispute*

On January 1, 1986, the Daily News took over the operation of a daily newspaper it had purchased from another company, the Valley News. At that time, the Company adopted its predecessor's policy of annually evaluating the performance of each editorial department employee on or about the anniversary of the employee's date of hire or last promotion, and using the performance review as the basis for increasing salaries. These merit increases could range from no increase to a substantial raise, depending upon the employee's evaluation.

Although the *amount* of the increase was discretionary, the timing of the reviews was fixed, and the sole criterion for determining the amount of the increase was merit (except for those employees who had already reached the top pay for their job classification). Moreover, a vast majority of all eligible employees received some kind of raise each year. For example, in 1986, 81.5% of the employees who received performance evaluations received merit raises; in 1987, 82.7% received merit raises; and in 1988 and the first five months of 1989, 89% received merit raises.[2] Petitioner/Cross-Respondent's Appendix ("P.A.") 430-31.

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[2] The Company argues that these percentages are misleading, because some employees (such as those who had not yet worked a full year or who worked part-time) received neither performance evaluations nor increases. This contention,

On May 8, 1989, the Board certified the Guild as the collective bargaining representative for all of the Company's full-time and regular part-time editorial department employees in Washington, D.C. and at eight locations in California. Bargaining negotiations between the Guild and the Company commenced on June 14, 1989. The parties agreed to defer bargaining on economic issues until all non-economic issues had been negotiated. Company negotiator Tom Burke also stated that, pending negotiations, the Company did not intend to continue with the merit program. P.A. 427. The Guild's Administrative Officer, James Smith, stated that he considered the salary increases to be an existing condition of employment that the Company could not unilaterally discontinue, and that, during the course of bargaining, the Daily News should continue to grant the increases to all employees on their anniversary dates. Burke replied that the Company would continue to consider whether it would discontinue the increases during the course of bargaining. *Id.* at 427-28.

Sometime after the June 14 bargaining session, the Daily News decided that it would not give any raises to employees who were part of the collective bargaining unit ("unit employees"). The Company concedes that this decision was not based on any merit determinations regarding the individual employees. Indeed, at least two

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while true, is irrelevant to the Board's findings. The percentages indicate that a very large majority of employees who were *eligible* to receive increases under the program did, in fact, receive some kind of raise.

unit employees were informed at their annual performance appraisal that, based on their performance, they would have received increases, but that the Company would not give raises because of the Union negotiations. Tr. of Hearing (Dec. 12, 1989) 27, 33-34, *reprinted in* P.A. 148, 154-55.

At the second bargaining session, held on July 5, 1989, Burke announced that the Company had decided to discontinue granting merit raises to unit employees. The Company did, however, continue to issue annual performance appraisals to all employees, and also continued to grant merit increases to those employees outside of the collective bargaining unit.

B. *The Board's Initial Conclusions*

The Guild filed a complaint with the NLRB, which issued a Decision and Order on August 27, 1991. *Daily News of Los Angeles,* 304 N.L.R.B. 511, 1991 WL 171476 (1991) (*"DNLA I"*). The Board found that the merit-increase program, although discretionary as to the precise amount of each individual increase, had nevertheless become a fixed term or condition of employment that, pursuant to *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), could not be changed without bargaining. While acknowledging the Company's discretion in setting the *amount* of any raises, the Board nevertheless determined that the Company was not free to discontinue the *policy,* and so was required to continue its prior practice of giving unit employees increases based on individualized merit assessments. *Id.* at 511.

Further, the Board rejected the Company's argument that the Guild had waived any possible objections to changes in the increase program by agreeing to the employer's exercise of discretion in granting the increases. The Board ruled that the Guild had only agreed to the exercise of discretion concerning the amount of the raises, but did not waive an objection to the discontinuance of the entire program. *Id.*

Accordingly, the Board determined that the Company had violated section 8(a)(5) of the NLRA by unilaterally withholding the annual merit increases from employees. The Board ordered the Company to cease and desist from this unfair labor practice and to make the unit employees whole for any monetary losses sustained because of the Company's unlawful conduct. *Id.* at 516.

C. *Previous Proceedings Before This Court*

On appeal, this court questioned whether the Board's core holding might be inconsistent with prior Board precedent. The court noted that, in other cases where there has been "an established pattern of increases that [was] fixed as to timing but discretionary as to amount," the Board has appeared to treat such programs as lacking the character of an established practice. *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1575 (D.C.Cir.1992). Of particular concern to the court was the Board's decision in *Anaconda Ericsson Inc.*, 261 N.L.R.B. 831, 1982 WL 24497 (1982). The court also noted that the Supreme Court's decision in *Katz*, on which the Board had relied, did not necessarily dictate the result reached by the Board because *Katz* only addressed the case of an employer who

unilaterally decides to *give* a discretionary merit wage increase, whereas, in this case, the Daily News was attempting to *discontinue* its policy. *See* 979 F.2d at 1573. Accordingly, the court remanded the case so that the Board could reconsider and more fully explain its apparent failure to follow *Anaconda Ericsson* and its application of *Katz* in a situation involving the discontinuance of merit increases. 979 F.2d at 1576.

The court, *sua sponte*, also invited the Board to address two additional issues on remand. First, the court asked how the Board could justify a back pay remedy for failure to grant discretionary wage increases when the amount of the increase each employee would have received was "by hypothesis . . . unascertainable." *Id.* at 1577. Second, the court questioned whether the prohibition on wage and benefit decreases during negotiations was consistent with the Supreme Court's decisions in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960), and *American Ship Building Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965), which impose limits on the Board's authority to find unlawful either party's choice of economic weapons in aid of its bargaining position. 979 F.2d at 1577-78.

D. *The Board's Decision on Remand*

The Board held on remand that, under *Katz*, *any* unilateral change covering a mandatory subject of bargaining is unlawful regardless of the nature of the change or the particular term or condition affected. *Daily News of Los Angeles*, 315 N.L.R.B. 1236, 1237-38, 1994 WL 731261

(1994) ("*DNLA II*"). The Board further noted that it had consistently applied *Katz* to find the unilateral discontinuance of merit raises to be unlawful whenever such raises had become established terms or conditions of employment. *Id.* at 1239-40. Agreeing that *Anaconda Ericsson* could not be reconciled with other Board decisions, however, the Board overruled it. *Id.* at 1241.

The Board also pointed out that a back pay award need only be based on an approximation of the amount lost, not an exact determination. The Board concluded that, in this case, an approximation could be reached, using such information as the past annual reviews of the unit employees, the merit increases given to unrepresented employees with similar reviews, and the amounts of the increases for unit employees in previous years. Thus, the Board concluded, its remedial order would make possible the calculation of a proper back pay award for each affected employee. *Id.*

Finally, the Board rejected the Company's argument that discontinuing the merit-increase program was a legitimate economic weapon protected under *Insurance Agents'* and *American Ship*. According to the Board, those cases only apply to parties that are engaged in lawful, good-faith bargaining. Therefore, because a unilateral change in a term or condition of employment is itself a violation of the duty to bargain, the Board reasoned that the Company's change could not be a lawful economic weapon. Accordingly, the Board reaffirmed its finding of a violation and its prior remedial Order. *Id.* at 1242-43.

II. Analysis

Sections 8(a)(5) and 8(d) of the NLRA require parties in a collective bargaining relationship to negotiate in good faith over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1988). However, this duty applies only to those areas that are considered to be mandatory subjects of bargaining. *See NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349-50, 78 S.Ct. 718, 722-23, 2 L.Ed.2d 823 (1958). Therefore, as an initial matter, we must determine whether the merit-increase program at issue in this case is, in fact, a mandatory bargaining subject. Because the program involved employee wages, we have no difficulty concluding that it was. *See, e.g., NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1161 (D.C.Cir.1992) (per curiam) ("[M]erit pay is a mandatory subject of bargaining. . . . ") (Edwards, J., concurring). Indeed, the Daily News does not dispute this point.

Given that the merit-increase program was a mandatory subject of bargaining, we next turn to the question of whether the program was impermissibly changed. The Supreme Court, in *Katz*, held that an employer violates the duty to bargain by unilaterally changing a term of employment with respect to a mandatory subject of bargaining during the course (or in the absence) of negotiations. 369 U.S. at 743, 82 S.Ct. at 1111. Such a change constitutes "a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Id.* at 747, 82 S.Ct. at 1114; *see also NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C.Cir.1982) (The court noted that an employer's implementation of a pre-

impasse unilateral change in established wages or working conditions, over which bargaining is required, will generally constitute a violation of section 8(a)(5).).

As the Board correctly explained in its supplemental decision, it makes absolutely no difference under *Katz* whether the change at issue adds to or subtracts from employees' wages, or whether it institutes a new employment policy or withdraws one that already exists. Thus, "in some circumstances it will be an unfair labor practice to grant unilaterally a wage increase, and . . . in other circumstances it will be an unfair labor practice to deny unilaterally a wage increase. The Act is violated by a unilateral *change* in the existing wage structure whether that change be an increase or the denial of a scheduled increase." *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 652-53 (6th Cir.1977) (citations omitted); *see also NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir.1970) ("The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge."). The dissent misreads this clear and well-established rule from *Katz*, and therefore misses the mark. It cannot be doubted that, under the prevailing case law from the Supreme Court, the circuit courts, and the Board, the relevant inquiry here is whether any established employment term on a mandatory subject of bargaining has been unilaterally changed.

In conducting this inquiry, we must sustain the factual findings of the Board so long as substantial evidence exists in the record to support them. *Universal Camera*

Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464-65, 95 L.Ed. 456 (1951). Moreover, as the Supreme Court has made clear, "because the classification of bargaining subjects as terms or conditions of employment is a matter concerning which the Board has special expertise, its judgment as to what is a mandatory bargaining subject is entitled to considerable deference." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 99 S.Ct. 1842, 1848, 60 L.Ed.2d 420 (1979) (citation and internal quotations omitted).

A. *The Company Changed a Fixed Term or Condition of Employment*

The Daily News argues that the merit-increase program was fully discretionary, leaving the Company free to discontinue the program at will without violating *Katz*. The Board's findings do not support the Company's contentions.

The decision of the Administrative Law Judge ("ALJ"), incorporated by the Board, states that, under the merit-pay program, the "salary increase, if any, is *based on merit*, and may range from no increase to a substantial increase depending on the perceived efforts and ability of the employee, and his or her value to the newspaper. The *amount of the increase*, if any, is totally discretionary." *DNLA I*, 304 N.L.R.B. at 514 (emphasis added). Thus, while acknowledging that the employer exercised discretion in deciding the *amount* of each increase, the ALJ made clear that employees routinely received annual reviews for the purpose of merit-based pay increases, and that an individual assessment of *merit* was the sole basis for determining the amount of an employee's increase.

Similarly, in its supplemental opinion, the Board explicitly noted that "the element of discretion retained by the [Company]" was "in setting the amount of merit raises." *DNLA II*, 315 N.L.R.B. at 1236. Nowhere does the record indicate that the Company was free, under the policy, to ignore its merit-based *criterion* in making wage-increase judgments. Indeed, the ALJ found that the Company "had instituted a pattern and practice of evaluating the unit employees at the time of each employee's anniversary date, and that *as a result of such evaluation* the [Company] would grant a discretionary merit salary increase to the employee *in an amount commensurate with the employee's evaluation.*" *DNLA I*, 304 N.L.R.B. at 515 (emphasis added). The Board therefore found that the Company's merit-increase policy was not completely discretionary. Rather, the employer was constrained both by the established procedures for evaluating employees and by the fixed criteria for making each individual merit decision.

The crucial question, therefore, is what *Katz* requires of an employer if an established merit-increase program is fixed as to timing and criteria, but discretionary as to amount.[3] Given that *Katz* proscribes unilateral changes to

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[3] The NLRB's supplemental decision (and the prior decision of this court) focused solely on the fact that the merit-increase program was fixed as to timing. While we find that the regularized, annual nature of the evaluations at issue is relevant to whether employees had come to view the merit increases as fixed terms or conditions of employment, *see, e.g., Guy Gannett Publishing Co.*, 295 N.L.R.B. 376, 378, 1989 WL 224140 (1989) (Because an annual wage-increase policy had been granted for many years, "the work force surely was entitled to regard it as a

mandatory subjects of bargaining, the answer to this question is relatively simple. In this case, employees knew that they would receive annual merit increases based on an evaluation of their work: increases were denied *only* when an employee's evaluation was unsatisfactory (or when an employee was already at the top of the salary scale).[4] Because the disputed program was a mandatory subject of bargaining, the employer could not terminate the pay plan without first bargaining to impasse with the Union. In other words, when the criteria for determining discretionary wage increases are fixed (even if the amount of each individual increase is discretionary), then *Katz* demands that the Company continue to apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously.

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permanent element in their wage structure program."), we do not believe that fixed timing alone would be sufficient to bring the program under *Katz*. In this case, had the Board found that the Company retained total discretion to grant the increases based on any factors it chose, we doubt that discontinuing the policy would have resulted in a violation of section 8(a)(5) even though the raises had been awarded annually.

[4] Supervising editor Robert Burdick stated in testimony before the ALJ that "it is our absolute policy to grant an increase when the supervisor feels that someone's work merits. And when someone's work doesn't, then that person simply does not get an increase." Tr. of Hearing (Dec. 13, 1989) at 129, *reprinted in* P.A. 251. Thus, unequivocal evidence in the record indicates that, prior to the Company's discontinuance of the merit-increase policy, a positive performance evaluation invariably corresponded to some form of wage increase.

Both this court and the NLRB have long applied this analytical framework to determine whether employers violate *Katz* when they unilaterally discontinue merit pay plans. As far back as 1971, this court held that an employer who had granted discretionary increases based on annual merit reviews was required to continue evaluating employees according to the plan. *UAW v. NLRB (Udylite Corp.)*, 455 F.2d 1357, 1365 (D.C.Cir.1971). Likewise, in *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C.Cir.1981), the court ruled that, even though the wage increases in question "contained both automatic and discretionary elements," the employer was obligated to bargain with the union before it could "discontinue entirely the *practice* of granting annual wage increases." *Id.* at 1189 (emphasis added).[5]

While the Board's precedent in this area has not always been a model of clarity, its decisions similarly indicate that, when an employer has established a regular wage-increase program with fixed criteria, even though discretionary in amount, that program cannot be discontinued unilaterally. *See, e.g., Rochester Inst. of Technology*, 264 N.L.R.B. 1020, 1020, 1982 WL 23769 (1982) (The Board

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[5] The Company points to the Second Circuit's decision in *J.J. Newberry Co. v. NLRB*, 442 F.2d 897 (2d Cir.1971), where the court ruled in favor of an employer that unilaterally discontinued a practice of periodic merit increases based on performance reviews. In that case, however, no collective bargaining representative had yet been certified, and so there was no one to consult in order to avoid acting unilaterally. Indeed, the Second Circuit subsequently distinguished *Newberry* on precisely this ground. *See NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1111 & n. 6 (2d Cir.1973).

adopted the ALJ's findings that the company's merit-increase policy had become a condition of employment similar to an actually promised increase.), *enforcement denied on other grounds*, 724 F.2d 9 (2d Cir.1983); *Allied Prods. Corp.*, 218 N.L.R.B. 1246, 1252, 1975 WL 5682 (1975) (Because the company had an established policy of evaluating the performance of its office clerical employees and rewarding such performance with wage increases, the employer could not suspend the entire program.), *enforced as modified*, 548 F.2d 644 (6th Cir.1977); *General Motors Acceptance Corp.*, 196 N.L.R.B. 137, 137, 1972 WL 4330 (1972) ("[A]n element of discretion . . . was retained by the [Company] with respect to particular employees, but certainly not to the entire [wage-increase] program."), *enforced* 476 F.2d 850 (1st Cir.1973).[6]

The Company points to two recent cases that found an employer's denial of wage increases to be lawful. However, in both instances, the employer did not suspend the program, but rather applied its usual evaluation criteria before deciding that no increases were justified. Thus, in *American Packaging Corp.*, 311 N.L.R.B. 482, 1993 WL 188249 (1993), the employer "followed procedures

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[6] Even *Anaconda Ericsson*, which the Board overruled, does not appear to run contrary to this general proposition. In that case, the Board ruled in favor of an employer who refused to grant a discretionary general wage increase during collective bargaining negotiations despite the fact that such an increase had been given in each of the prior five years. However, there was no evidence that the general wage increases were determined through the application of any fixed criteria. Therefore, it is unclear whether any term or condition of employment had been established. *See id.* at 834-35.

used in the past and legitimately determined" the amount of an annual across-the-board bonus. *Id.* at 483. The Board ruled that the mere fact that use of the formula resulted in no bonus in that particular year did not make its use a change in existing practice. *Id.* Similarly, in *Stone Container Corp.*, 313 N.L.R.B. 336, 1993 WL 496575 (1993), the employer's decision not to grant a wage increase was based on the results of its regular annual survey. There was no evidence that the employer used anything other than its usual criteria for determining the amount of the increase. *See also Brannan Sand & Gravel Co.*, 314 N.L.R.B. 282, 1994 WL 363562 (1994) (The Board permitted an employer to make a unilateral change in its health care plan because the change was made in accordance with its regular review of the costs and benefits of the plan.).[7]

The Daily News was, therefore, required to continue its prior practice of making individualized determinations based on merit. Although the Company remained free to evaluate the merit of each employee and to deny increases if no one was deserving, it could not make an across-the-board policy determination based on non-merit criteria. It is undisputed, however, that the Company did not, in fact, base its decision to deny increases on particularized merit considerations. Rather, the Company made a broad policy determination that, regardless of merit, no unit employees should receive increases. By

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[7] The Company's reliance on *Winn-Dixie Raleigh, Inc.*, 267 N.L.R.B. 231, 1983 WL 24904 (1983), is also misplaced because there was no finding in that case that the employer had established fixed criteria for determining the amount of its yearly, across-the-board wage increase. *See id.* at 235.

ignoring the established criteria for making its wage-increase decisions, the Company changed a fixed aspect of the policy.

The Board's finding that an individualized merit evaluation was the only established criterion for determining the amount of each increase has sufficient support in the record to require affirmance under *Universal Camera*. Indeed, the Company's editor, Robert Burdick, testified that, in general, no factors other than performance were considered by the Company in assessing raises. Tr. of Hearing (Dec. 13, 1989) 175, *reprinted in* P.A. 297. The employer has also made no assertion that the general economic status of the Company was part of the criteria that had previously been considered in determining the amount of the increases. More importantly, the record reflects that the Company was not economically unable to give the increases, and indeed, non-unit employees continued to receive raises as before.

The Board was also justified in finding that the employer did not use individual merit assessments in reaching its decision to deny increases to all unit employees. Editor Burdick admitted that at least some of the employees who were evaluated after July 1989 deserved increases based on the performance evaluations, but did not receive them. *Id.* at 176, *reprinted in* P.A. 298. In addition, two editorial employees testified that they were told by management that they would have received increases but for the ongoing Union negotiations. Tr. of Hearing (Dec. 12, 1989) 27, 33-34, *reprinted in* P.A. 148, 154-55. Thus, the record indicates that, under the Company's usual criteria, employees would have

received raises, but that the Daily News opted to discontinue the entire program. Because the Daily News made an across-the-board decision not to grant any increases, rather than a decision based on the established criteria that each employee did not deserve one, the Company's action constituted an impermissible change in a mandatory subject of bargaining.[8]

B. *The Company's Action Was Not a Legitimate Economic Bargaining Weapon*

The Supreme Court has placed limits on the Board's power to "sit in judgment upon every economic weapon the parties to a labor contract negotiation employ." *Insurance Agents'*, 361 U.S. at 497-98, 80 S.Ct. at 432. In *Insurance Agents'* the Court ruled that participants in collective bargaining may, without violating their duty to bargain,

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[8] The Daily News asserts that its decision to stop granting the wage increases was not a permanent policy change because it informed Union representatives that future merit increases would be subject to negotiations with the Guild regarding the economic package as a whole. Thus, according to the Company, this case is similar to *Stone Container* and *American Packaging*, where the NLRB found no violation when an employer simply decided not to award a discretionary merit increase in a given year. However, as discussed *supra*, in those cases, the employers applied their existing formulae for granting wage increases, and then decided that no one was eligible. In contrast, the Daily News suspended the entire policy despite the existence of deserving employees. Such an action constitutes a change in a term or condition of employment regardless of how long the suspension lasts. *See, e.g., Udylite Corp.*, 455 F.2d at 1365 (The court found a violation even though the unilateral suspension of a merit review plan lasted less than five months.).

use tactics designed to exert economic pressure. Similarly, in *American Ship*, 380 U.S. at 318, 85 S.Ct. at 967, the Court held that a lockout in support of an employer's legitimate bargaining position does not violate employees' bargaining rights.

The Daily News rightly points out that these cases strip the Board of the power to interfere with the Company's *legitimate* economic weapons in the guise of enforcing a duty to bargain in good faith. However, the Board is only forbidden to pass judgment on a particular economic weapon if that weapon is *"used in support of genuine negotiations."* *Katz*, 369 U.S. at 747, 82 S.Ct. at 1113 (emphasis added). *Katz* made clear that the Board retained the power "to order the cessation of behavior which is in effect a refusal to negotiate." *Id.; see also American Ship*, 380 U.S. at 308, 85 S.Ct. at 962 (The Court specifically excluded from its discussion those cases where the employer used an economic weapon "as a means . . . to evade his duty to bargain collectively.").

In this case, as in *Katz* itself, the unilateral action of the employer constitutes a refusal to negotiate to impasse over a mandatory subject of bargaining, which is a violation of section 8(a)(5) precisely because such an action impermissibly interferes with the collective bargaining process. It is clear beyond a doubt that the Company's action cannot fall within *Insurance Agents'* or *American Ship* because, in refusing to negotiate over a mandatory subject, the employer is evading the duty to bargain. Nothing in *Insurance Agents'*, *American Ship*, or *Katz* allows an employer to refuse to bargain over a mandatory subject by simply declaring the refusal to be an "economic weapon" or tactic to gain leverage in negotiations.

To condone such a proposition would make a mockery of the bargaining process.

C. *The NLRB's Remedy is Sufficiently Administrable*

Section 10(c) of the NLRA authorizes the Board, upon finding a violation of the Act, to order the violator "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c) (1988). The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99, 104 S.Ct. 2803, 2812, 81 L.Ed.2d 732 (1984). And the Court has cautioned the courts of appeals that "they should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices." *Id.* at 899, 104 S.Ct. at 2812. Thus, the Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218-19, 87 L.Ed. 1568 (1943).

In cases involving a violation of section 8(a)(5) based on a company's unilateral alteration of existing benefits, this court has found it appropriate " 'to order restoration of the *status quo ante* to the extent feasible, and in the absence of evidence showing that to do so would impose an undue or unfair burden upon the [employer].' " *NLRB*

v. Cauthorne, 691 F.2d at 1025 (quoting *Allied Prods. Corp.*, 218 N.L.R.B. at 1246). Such a rule is designed "to prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining undue advantage at the bargaining table when he bargains about the benefits which he has already discontinued." *John Zink Co.*, 196 N.L.R.B. 942, 942, 1972 WL 12497 (1972).

The Company argues that, in this case, because the amount of the wage increases was discretionary, there is no workable procedure for determining how much back pay any given employee might be owed. We disagree. The Daily News continued to give annual merit reviews and performance ratings to both unit and unrepresented employees and to grant merit increases to the latter group based on those reviews and ratings. Thus, in a back pay proceeding, the Board could consider, for each unit employee, the amounts of raises given to unrepresented employees with similar ratings; the amounts of increases given to the same employee in previous years when his or her rating was similar; the increases given to other editorial employees with similar ratings in previous years; and whether the employee was already at or near the top of the salary range for his or her position.

All of these criteria are sufficiently objective to confine the inquiry as to what the raise would have been. In addition, the employer remains free to advance any appropriate arguments regarding how the various factors would have been applied in specific cases. In any event, because the evidence from past years indicates that at least 80% of the eligible employees would have received *some* increase, the Board will undoubtedly come closer to approximating what would have occurred by attempting

to estimate back pay, than by denying a back pay remedy altogether. *See NLRB v. Overseas Motors, Inc.*, 818 F.2d 517, 521 (6th Cir.1987) ("The Board is required only to adopt a formula which will give a close approximation of the amount due; it need not find the exact amount due." (citation omitted)). Moreover, just because the Board's proposed remedy involves some uncertainty is not sufficient reason to reverse the decision. *See NLRB v. International Ass'n of Bridge, Structural & Ornamental Iron Workers Local 433*, 600 F.2d 770, 778-79 (9th Cir.1979) (A back pay award should be enforced despite uncertainty as to the identity of the victims of unfair labor practices.), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980); *Chemvet Lab., Inc. v. NLRB*, 497 F.2d 445, 452-53 (8th Cir.1974) (Back pay order is enforceable even though amounts of available overtime and identity of employees who have worked overtime are uncertain.). Given the deferential standard of review with respect to the Board's judgment in this matter, we do not find that the award of back pay is either unwarranted or an abuse of discretion.

D. *Other Claims*

The Company's remaining claims lack merit. First, the Daily News contends that, under *Katz*, it is precluded from giving wage increases without a waiver from the Union. According to the Company, because the Guild expressed the desire to bargain about merit wages in general, there was no waiver, and the Company could not give the increases without violating *Katz*.

This argument is specious. As discussed *supra*, *Katz* only forbids a unilateral change of the employer's

existing practices covering mandatory subjects of bargaining. Nothing prevented the Daily News from continuing its existing merit-increase program, particularly since the Union representative specifically demanded that the Company keep the program in place pending negotiation. Furthermore, simply because employees choose to negotiate over an existing term or condition of employment does not mean the employer is free to change the term unilaterally in the interim. Otherwise, *Katz'* proscription against unilateral change would be meaningless.

The Daily News also argues that the Board's decision should be reversed because it failed to reach a majority rationale and because the decision to overrule *Anaconda Ericsson* should not be enforced retroactively. We reject both of these claims. First, all four participating Board members did agree on the controlling legal principle that an employer may not unilaterally discontinue an established practice of granting merit increases even though the employer retained discretion as to the amount of the increases. *See DNLA II*, 315 N.L.R.B. at 1243-44 (Members Stephens and Cohen, concurring). Thus, this is not a case where "the Board's failure to articulate which test it was relying on, or, at a minimum, to explain how the same result could be reached under each of those tests, did not reflect the reasoned decisionmaking required of administrative agencies." *Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 91 (D.C.Cir.) (citing *United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1436-37 (D.C.Cir.1989)), *cert denied*, ___ U.S. ___, 116 S.Ct. 81, 133 L.Ed.2d 39 (1995).

Second, the retroactive overruling of *Anaconda Ericsson* does not constitute "an abrupt break with well-settled policy," *United Food & Commercial Workers Local 150-A v. NLRB (Dubuque Packing Co.)*, 1 F.3d 24, 34 (D.C.Cir.1993) (internal quotation omitted), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2157, 128 L.Ed.2d 882 (1994), sufficient to reverse the Board's decision. Indeed, it is not at all clear that *Anaconda Ericsson* was inconsistent with the Board's ruling in this case or that it needed to be overruled. *See* note 6 *supra*. Nevertheless, to the extent the overruling was necessary to clarify the Board's precedent, such an effort is more appropriately viewed as an "attempt to fill a void in an unsettled area of the law," which is permissible under *Dubuque Packing*. 1 F.3d at 34 (internal quotation omitted).

III. Conclusion

This case presents a more simple series of questions than the arguments of the parties or the long procedural history might lead one to believe. Under *Katz*, an employer may not unilaterally change a term or condition of employment with respect to a mandatory subject during the collective bargaining process. If an established merit-increase program is fixed as to timing and criteria and discretionary only as to amount, then the employer is obligated to keep the program in place and continue to apply the same criteria. Because the Daily News did not use its fixed criteria, but instead made a decision to discontinue the merit-pay program regardless of individual performance, we find that it changed an established term of employment with respect to a mandatory subject of bargaining, thereby violating *Katz*. Furthermore, the

Board's proposed remedy is sufficiently administrable to justify enforcement. Therefore the petition for review is denied, and the cross-application for enforcement is granted.

So ordered.

KAREN LECRAFT HENDERSON, Circuit Judge, dissenting:

In *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), the Supreme Court held that an employer violates section (8)(a)(5) of the National Labor Relations Act (Act) by unilaterally awarding discretionary merit increases during union negotiations. Now the majority holds it is a violation of the same section *not* to award such raises. Neither authority nor reason supports this "catch 22" conundrum.

In *Katz*, the Supreme Court rejected the contention that, because the merit raises awarded "were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews," they "in effect, were a mere continuation of the status quo." 369 U.S. at 746, 82 S.Ct. at 1113. If awarding such a raise does not continue the status quo, I do not see how the raise can be "a fixed condition or term of employment," as the majority would have it. *See Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493 (10th Cir.1994) ("Payments to employees which are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectation and thus are not considered 'terms and conditions' of employment.") (citing *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1575 (D.C.Cir.1992)).

The majority strains mightily, but unconvincingly, to escape the inevitable effect of *Katz*. Most fundamentally, the majority attempts to portray the annual increases as something other than "discretionary," dismissing that term as an "appellation" and a "label." Majority Op. at 408. Yet the Board itself so described the raises based on the administrative law judge's unassailable factual finding that "the amount of the increase, if any, is totally discretionary." 304 N.L.R.B. at 514. Given this total discretion, the Company was bound, as the majority concedes, only to give "an *appropriate* increase" if an employee's evaluation so "warranted." Maj.Op. at 408 (emphases added). Such a program may not have been "whimsical," as the majority states, but it does seem wispish. It plainly did not create a "fixed" term of employment or give employees any bankable expectations.[1]

The majority also seeks support from Circuit case law, *see* Maj.Op. at 412, but its authority is inapposite. In *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C.Cir.1981),

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[1] That the discretionary raise was not a "fixed" term of employment is clear from the obvious impracticality of the Board's remedy, which the majority has endorsed ("that the employees be paid the 'difference between their actual wages and the wages they would have otherwise received' if the merit increases had not been unilaterally discontinued", 304 N.L.R.B. at 516). As we observed in our earlier opinion in this case: "Given the ALJ's finding here that the amounts of raises in the past practice were 'totally discretionary', it is altogether unclear how the ALJ or the Board would enforce its order that the News pay the employees 'the difference between their actual wages and the wages they would have otherwise received', as the latter by hypothesis are unascertainable." 979 F.2d at 1577 (record citations omitted).

the merit raise was "discretionary" only in that the amount varied according to the objective criterion of job classification. It did not depend, as the raises here do, on the employer's subjective assessment of the employee's performance. *See Katz*, 369 U.S. at 746, 82 S.Ct. at 1113-14 (distinguishing "the case as to so-called 'merit raises' which are in fact simply automatic increases to which the employer has already committed himself"). On the other hand, in *UAW v. NLRB*, 455 F.2d 1357 (D.C.Cir.1971), the court, "assuming that increases pursuant to the merit review plan were wholly discretionary," concluded that "employees would at least have expected that they would be evaluated according to the plan." 455 F.2d at 1365. Here, as the majority acknowledges, this expectation was satisfied. *See* Maj.Op. at 409 ("The Company did, however, continue to issue annual performance appraisals to all employees.").[2]

Because the Company's practice of awarding totally discretionary annual merit raises was not a fixed term or condition of employment, I dissent from the majority's denial of the petition for review.

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[2] The opinions the majority cites from other circuits, *see* Maj.Op. at 411, are no more helpful. In *NLRB v. Allied Prods. Corp.*, 548 F.2d 644 (6th Cir.1977), the court upheld the NLRB's conclusion that the discontinuance of an *annual review program* violated the Act, while in *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93 (5th Cir.1970), the raises at issue were not "totally discretionary" but rather "automatic progression wage increases" of "10 to 15 cents per hour" that "were regularly granted every six months." 434 F.2d at 96.

The Daily News of Los Angeles, a Division of Cooke Media Group, Inc. *and* Los Angeles Newspaper Guild, The Newspaper Guild Local 69, AFL-CIO. Case 31-CA-17751

December 30, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, AND COHEN

On August 27, 1991, the National Labor Relations Board issued its Decision and Order in this proceeding finding, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) by unilaterally withholding annual merit wage increases from employees during negotiations with the Union for an initial contract.[1] In finding the violation, the Board relied on the Supreme Court's decision in *NLRB v. Katz*[2] and the Board's decision in *Oneita Knitting Mills*[3] to conclude that where, as here, the Respondent maintained an established practice of granting merit raises that were fixed as to timing but discretionary in amount, it was precluded from discontinuing that practice without bargaining to agreement or impasse with the Union.

Thereafter, the Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit. On December 11, 1992, the court issued a decision which

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[1] 304 NLRB 511.

[2] 369 U.S. 736 (1962).

[3] 205 NLRB 500 (1973).

found that the Board's holding prohibiting the discontinuance of annual merit increases that were discretionary in amount was inconsistent with Board precedent and was "by no means compelled by the logic of *Katz*."[4] The Court stated that although *Katz* "stand[s] for the proposition that an employer may not unilaterally continue discretionary increases,"[5] the "opinion said not a word about discontinuance of a past pattern of discretionary wage increases, and . . . the Board here offered no explanation of the extension."[6] Accordingly, the court remanded the case to the Board to reconcile the conflict with its precedent on this issue and "for consideration of whether an employer is bound under *Katz* to persist in a merit raise program that is entirely discretionary as to amount."[7]

On April 9, 1993, the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position. Thereafter, all parties filed statements of position.

Having accepted the remand, the Board must observe the court's opinion as the law of the case and, necessarily, its judgment that the Board's finding regarding the unlawful discontinuance of the discretionary merit raise practice is not compelled by *Katz*. Nevertheless, upon reconsideration in light of the court's opinion and the

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[4] *Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1573 (D.C. Cir. 1992).

[5] Id. at 1574.

[6] Id. at 1573.

[7] Id. at 1576.

parties' statements of position, the Board has decided for the reasons stated below to reaffirm its finding of a violation on the basis that a reasonable interpretation of *Katz* supports the conclusion that the Respondent violated the Act.

Discussion

The facts pertaining to the Respondent's merit review program are undisputed. Briefly stated, since 1986 when the Respondent took over the newspaper operations of its predecessor, it continued an existing practice of annually evaluating the performance of all its employees – the editorial department employees at issue here as well as the unrepresented employees. The performance appraisals were regularly given at the time of the employees' employment anniversaries and resulted in wage raises of between 3 and 5 percent generally for those who received them.[8] The raises were based on merit and the amount of each raise was determined solely by the Respondent in its discretion. In short, the Respondent's overall review program consisted of appraising every employee once a year, considering each employee for a merit wage increase, and granting a merit increase to at least 80 percent of the employees.[9]

After the Union was certified as the bargaining representative of the editorial employees and negotiations

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[8] A small minority (fewer than 10 percent) received increases in amounts ranging from 12 to 40 percent.

[9] The Respondent denied merit increases to 18.5 percent of the unit employees in 1986 and to 17.3 percent in 1987.

commenced for a contract, the Respondent continued to evaluate all of its employees annually and to grant merit increases to its unrepresented employees. It discontinued however, granting merit increases to the editorial department employees.

Notwithstanding the element of discretion retained by the Respondent in setting the amount of merit raises, the Board found, and we do not understand the court as disagreeing, that the merit review program was an established practice and a term and condition of employment regularly expected by the employees.[10] This finding provides the starting point for analyzing the primary question presented to us by the court: whether the Respondent, during contract negotiations with the Union, was privileged under *Katz* to discontinue an established condition of employment in which all unit employees were annually considered for, and a vast majority were awarded, merit increases.

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[10] Accordingly, we disagree with the characterization of the merit increase program in the instant case by the 10th Circuit in its recent decision in *Phelps Dodge Mining Co. v. NLRB*, 17 F.3d 1334 (1994), as not constituting a tenth and condition of employment. Nothing in the D.C. Circuit's decision in this case suggests that the court disagreed with the Board's finding in this regard. To the contrary, that court reversed and remanded this case to the Board for a reanalysis of our decision under *Katz*, an analysis which, as the *Phelps Dodge* court acknowledges, applies only to subjects which constitute terms and conditions of employment within the meaning of Sec. 8(d) of the Act. See, e.g., *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1, 8 (1st Cir. 1981), where the court noted that "[i]ndefiniteness as to amount and a flavor of discretion do not . . . prevent [merit raises] from becoming part of the conditions of employment."

I. THE KATZ ISSUE

A. *Unilateral Conduct Which Effectuates a Change in a Mandatory Term and Condition of Employment is Prohibited by Katz*

The Board and the court agreed in this case that the starting point for discussion is the Supreme Court's decision in *Katz*.

In *Katz*, the employer, during negotiations for an initial contract and without notification to or bargaining with the union, put into effect a new sick leave plan and granted across-the-board wage increases and discretionary merit increases to a selected number of employees. The Court, equating this conduct with a literal refusal "even to negotiate in fact – 'to meet . . . and confer' – about any of the mandatory subjects," stated that the employer's unilateral action violated Section 8(a)(5) "for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal." 369 U.S. at 743. The Court went on to explain:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. [Id. at 747.]

Indeed, the Court viewed unilateral conduct so pernicious to the collective-bargaining process that it held

that a showing of subjective bad faith on the employer's part is unnecessary to establish a violation.

Although the court's opinion in this case suggests that the holding of *Katz* is limited by its facts, i.e., the unilateral *continuance* of a merit wage program, neither the Board nor courts have given such a narrow reading to *Katz* in subsequent decisions. Thus, the Board and courts have applied *Katz* to enjoin unilateral conduct by employers in a wide variety of contexts, including the prohibition of a unilateral *discontinuance* of an employer practice of providing employees with coffee and rolls and permitting them to smoke in a warehouse;[11] the prohibition of an employer's unilateral *discontinuance* of a hiring hall arrangement;[12] the prohibition of a unilateral *decrease* from 1 hour to 15 minutes of paid free time for employees working double shifts, the unilateral *alteration* of a method to compute holiday pay, and the unilateral *modification* in the model of respirators to be worn by employees;[13] the prohibition of a unilateral *substitution* of one insurance plan for another;[14] the prohibition of a unilateral *modification* of a policy governing the right of

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[11] *Chemtronics Inc.*, 236 NLRB 178, 190 (1978).

[12] *Southwestern Steel Inc.*, 806 F.2d 1111, 1113 (D.C. Cir. 1986), enfg. 276 NLRB 1569 (1985); *Sheeran v. American Commercial Lines*, 683 F.2d 970, 977 (6th Cir. 1982).

[13] *J.P. Stevens & Co. v. NLRB*, 623 F.2d 323 (4th Cir. 1980), enfg. in part 239 NLRB 738 (1978).

[14] *Oil, Chemical & Atomic Workers (Kansas Refined Helium) v. NLRB*, 547 F.2d 575 (D.C. Cir. 1976); *Bastian-Blessing v. NLRB*, 474 F.2d 49, 53 (6th Cir. 1973), enfg. 194 NLRB 609 (1971).

taxi drivers to take their cabs home at night;[15] the prohibition of a unilateral *increase* in hourly shift schedules, a unilateral *increase* in health insurance premiums to be paid by employees, and a unilateral *decrease* in bus service provided to employees;[16] and the prohibition of a unilateral implementation of an economic layoff.[17] See also John H. McGuckin, Jr., *Clipping the Fringes: An Employer's Duty to Bargain Prior to Unilaterally Changing Employee Benefits*, 10 U.S. F. L. Rev. 175 (1975) (reviewing *Katz'* application to unlawful *discontinuances* of Christmas bonuses).

In none of these cases was it determinative whether a continuance or a discontinuance, or an increase or a decrease, or an alteration or modification of a condition of employment had been effectuated. Rather, each of the unilateral acts was struck down on the authority of *Katz* because a condition of employment had been unilaterally *changed*. As stated by the Fifth Circuit in *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (1970):

> The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is

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[15] *Seafarers Local 777 v. NLRB*, 603 F.2d 862, 888-890 (D.C. Cir. 1978), enfg. in part 229 NLRB 1329 (1977); see also *Wil-Kil Pest Control Co. v. NLRB*, 440 F.2d 371, 374-375 (7th Cir. 1971) (same regarding use of company car).

[16] *Millard Processing Services*, 310 NLRB 421 (1993).

[17] *Garment Workers Local 512 (Felbro, Inc.) v. NLRB*, 795 F.2d 705, 710-712 (9th Cir. 1986), enfg. 274 NLRB 1268 (1985), citing *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981) (unilateral *discontinuance* of pension fund contributions violates Sec. 8(a)(5)).

> that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.
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> . . . .
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> In other words, whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining. Both unprecedented parsimony and deviational largess are viewed with a skeptic's eye during . . . bargaining. In those cases where the employer was found guilty of an unfair labor practice for withholding benefits during . . . the process of collective bargaining, the basis of the charge was a finding that the employer has changed the established structure of compensation. [Emphasis in the original.][18]

In our view, the standard set forth in *Dothan Eagle*, which looks to whether a *change* has been implemented in conditions of employment, captures best what lies at the heart of the *Katz* doctrine. It neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act. It simply determines whether a change in

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[18] See also *NLRB v. Southern Coach & Body Co.*, 336 F.2d 214, 217 (5th Cir. 1964) ("there must be an actual change in working conditions" to establish an 8(a)(5) violation under *Katz*).

any term and condition of employment has been effectuated, without first bargaining to impasse or agreement, and condemns the conduct if it has.

B. *The D.C. Circuit and Other Courts have Applied Katz in Concluding that Unilateral Changes Resulting in Discontinuance of Merit Raises Violate the Act*

In *NLRB v. Allied Products Corp.*,[19] the employer unilaterally discontinued merit increases which, like here, were fixed as to timing but discretionary in amount. With reasoning almost identical to the standard set forth in *Dothan Eagle*, the Sixth Circuit explained:

> The Act is violated by a unilateral change in the existing wage structure whether that *change* be an increase or the denial of a scheduled increase. Because the Company unilaterally *changed* an existing condition of employment, instead of maintaining the status quo, the Board properly found that it had committed an unfair labor practice. [Id. at 653, emphasis in the original.]

Similarly, the Eighth Circuit has affirmed the Board's finding that the discontinuance of merit increases violated Section 8(a)(5). In *Litton Microwave Cooking Products v. NLRB*,[20] the employer had a practice of granting employees a merit increase every February since 1978 in amounts determined by employer discretion. After the union was certified and while the parties were engaged in bargaining for an initial contract, Litton withheld the

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[19] 548 F.2d 644 (6th Cir. 1977), enfg. 218 NLRB 1246 (1975).

[20] 949 F.2d 249 (8th Cir. 1991), enfg. 300 NLRB 324 (1990).

increases in February 1981. Relying on *Katz*, the court held that "[B]ecause employers may not unilaterally change conditions of employment." Litton's discontinuance of the February increases without bargaining with the union violated the Act. 949 F.2d at 252-253.

Most significantly, the D.C. Circuit in *Auto Workers (Udylite Corp.) v. NLRB*[21] also extended *Katz* to find unlawful unilaterally discontinued merit raises. The facts of that case are virtually indistinguishable from the instant case. As described by the court in *Auto Workers*, "[b]efore the Union's certification, the Company had a policy of granting wage increases according to annual merit reviews. This policy was discontinued after certification and during the negotiations. Although an interim plan was agreed upon, certain merit review increases were withheld until the end of the strike," which commenced shortly after the interim agreement and continued for 4 more months.[22] Affirming the Board's finding of a violation, the court held:

> Even assuming that increases pursuant to the merit review plan were wholly discretionary, the plan operated according to Company policy, and employees would at least have expected that they would be evaluated according to the plan. Although the Company asserts that it undertook its action in order to comply with *Katz*, compliance with the law required that it consult with

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[21] 455 F.2d 1357 (1971), enfg. 183 NLRB 163 (1970).

[22] Id. at 1361. For a fuller description of the merit review policy and the circumstances leading to its discontinuance, see 183 NLRB at 170.

> the Union prior to suspension of the program. [Id. at 1365.]

Further despite the court's suggestion in the present case that its decision in *NLRB v. Blevins Popcorn Co.*[23] was too ambiguous to support the broad rule that *Katz* applies to unilateral discontinuances of merit increases, we find that that decision also supports the Board's finding in this case. In finding unlawful the unilateral discontinuance of discretionary merit increases in that case, the court stated:

> Under [these] circumstances, if the company wished to discontinue entirely the practice of granting annual wage increases, it was required to bargain with the union first; *Katz* requires an employer to consult with the union before changing an existing condition of employment. [659 F.2d 1189, emphasis added.]

This is precisely what the Board required of the Respondent in the instant case. The only ambiguity in *Blevins Popcorn* was whether the employer bargained with the union before discontinuing the increases, and as to that factual question the case was remanded to a Special Master. On remand, the Special Master found that the company had failed "to fulfill the obligation to consult with the Union" before discontinuing the merit raises.[24] Accordingly, because the "Company's practice of granting merit increases in December was an existing condition of employment, notwithstanding the discretionary

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[23] 659 F.2d 1173 (D.C. Cir. 1981).

[24] *NLRB v. Blevins Popcorn Co.*, 117 LRRM 2342, 2345 (S.M. report (1982)).

element, [and] could not be unilaterally discontinued without prior consultation with the Union," (*id.* at 2345), the Special Master found the company in civil contempt of an earlier order by the court that it bargain in good faith. The court of appeals affirmed the Special Master, 117 LRRM 2392 (D.C. Cir. 1983).[25]

C. *Discontinued Merit Raises that Constitute a Change in a Term of Employment Have Consistently Been Found Unlawful by the Board under Katz*

Contrary to the court's suggestion, the Board has consistently applied *Katz* to prohibit an employer from unilaterally changing an existing term and condition of employment during bargaining, regardless of whether the change involved a continuance or discontinuance of the existing term.

In accord with this prohibition imposed by *Katz*, the Board sought to explain in its original decision in the instant case what an employer's obligation is when, as here, the existing term of employment involves the annual grant of discretionary merit raises. The Board stated that the same bargaining obligation applies whether the issue involved is the employer's unilateral granting of merit increases or its unilateral discontinuance of them, reciting the following passage from

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[25] See also *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1163 (D.C. Cir. 1992), in which this court cited *Blevins Popcorn* in support of the proposition that *Katz* applies to unilateral discontinuances of discretionary merit raises.

Oneita Knitting Mills,[26] a case, like here, involving an employer who had a practice of annually reviewing employees in order to determine the amount of a merit increase to award:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan*) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. [Citing *Katz*.] What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

The court found that our reliance on *Oneita* was misplaced because the violation found therein was the employer's continuance in granting the merit raises, unilaterally, after the union's certification, "so the decision is clearly not a holding on the present issue." 979 F.2d at 1573. The court further noted that although the *Southeastern Michigan*[27] case cited in *Oneita* was similar to the instant case to the extent that it involved an unlawfully discontinued wage increase program, the court found that it too did not support the Board's holding because the discontinued increases in *Southeastern Michigan* were

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[26] 205 NLRB 500 fn. 1 (1973).

[27] *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972).

"fixed nondiscretionary raises" rather than, as here, discretionary increases. Id.

We agree that neither *Oneita* nor *Southeastern Michigan* presents facts precisely congruent with those in this case, but we nevertheless view these cases as instructive and supportive of our original conclusions. Although *Oneita* presents the reverse of the instant situation in that the Respondent here withheld increases while the employer in *Oneita* granted them, a bargaining obligation arose in both instances because a change in employment conditions was effectuated. Further, contrary to the court's suggestion, the duty to bargain is equally applicable in cases like *Southeastern Michigan* where an employer seeks to discontinue fixed *non-discretionary* wage raises because there, also, the discontinuance produces a change.[28] Again, it is the unilateral change in the terms and conditions of employment that results in the finding of an 8(a)(5) violation, not the type of wage increase that is continued or discontinued.

Accordingly, because the employers' conduct in both *Oneita* and *Southeastern Michigan* constituted a unilateral change in a condition of employment, we believe that both of those cases support the Board's finding of a violation in this case. Similarly, the additional cases earlier cited by the Board in the instant case, i.e., *Central*

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[28] By contrast, when an employer continues, after a union has been certified, to grant fixed *nondiscretionary* wage increases unilaterally, no 8(a)(5) violation results because there has been no change in the terms and conditions of employment. Rather, in this situation, as *Katz* explained, there is "in effect . . . a mere continuation of the status quo." 369 U.S. at 746.

Maine Morning Sentinel,[29] *Rochester Institute of Technology*,[30] *Allied Products Corp.*,[31] and *General Motors Acceptance Corp.*,[32] are consistent with the Board's finding of an 8(a)(5) finding in this case. Each of these cases involved, as here, an established practice in which unrepresented employees received merit increases that were granted at regular specified periods each year but that were discretionary in amount. And, in each case, the Board applied *Katz* to find that the employers violated the Act by discontinuing those raises during negotiations with the unions that had been newly certified as the employees' collective-bargaining representative.

Contrary to the court, we do not believe that these cases can be meaningfully distinguished on the basis that the range of merit raise discretion exercised by the employers therein was narrower than that exercised by the Respondent. First, we note that accurate comparisons in this regard are possible in only two of the four cited cases, and as to these, we do not find that the discretionary range of the merit raise amounts was significantly different than in this case. Here, the range of discretion was exercised *generally* within a 3- to 5-percent range compared to the 4- to 8.9-percent range in *Central Maine* and the 0- to 13-percent range in *Rochester*.[33] Second, and

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[29] 295 NLRB 376 (1989).

[30] 264 NLRB 1020 (1982).

[31] 218 NLRB 1246 (1975).

[32] 196 NLRB 137 (1972).

[33] The court mistakenly stated that *Rochester* was the case where employees received merit raises between 10 and 25 cents per hour. Rather, *Allied Products* was the case where employees

perhaps most importantly, the discretionary range of the increases here resembled closely the range of discretion of the merit raises which this court found were unlawfully discontinued in *Auto Workers*, supra, i.e., "generally not in excess of 8 per cent of base salary."[34] Finally, we are unaware of any precedent or reason that supports the court's suggestion that an employer must operate within a narrow range of discretion in order to find unlawful a unilateral change with respect to merit raises.

We do not regard our recent decisions in *American Packaging Corp.*[35] and *Stone Container Corp.*,[36] or the Board's decision in *American Mirror Co.*,[37] as being contrary to the legal principles discussed above.

In *American Packaging* the employer had for many years prior to the union's 1990 certification granted its employees production-based bonuses every September 1, the amounts of which were determined at the employer's discretion after reviewing the past year's costs and profits. During the course of negotiations for an initial

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received these amounts. However, since it is not known in *Allied Products* what the employees' base wages were, it is not possible to convert into percentages the 10- to 25-cent raises for the purpose of comparing those range amounts with the one at issue here. For essentially the same reason, a similar comparison is impossible with respect to the discontinued $30-merit raises in *General Motors*.

[34] *Udylite Corp.*, 183 NLRB 163, 170 (1970), enfd. sub nom. *Auto Workers v. NLRB*, 455 F.2d 1357 (D.C. Cir. 1971).

[35] 311 NLRB 482 (1993).

[36] 313 NLRB 336 (1993).

[37] 269 NLRB 1091 (1984).

contract, the union advised the employer that it should use the same formula that it had used in the past in calculating the 1990 bonuses, but that if the employer determined that no bonuses were due its nonunion employees under that formula, the union did not expect a bonus to be paid to the union employees. As requested, the employer applied its formula and determined that in light of its worst performance year to date, no production bonuses were earned by any of its employees – union and nonunion. On these facts, the Board found that notwithstanding its failure to pay 1990 bonuses, the employer did not act unlawfully because, in effect, it had not permanently discontinued the bonus program. On the contrary, it bargained with the union, the union waived its right to bargain about the bonus amount to be paid the employees by advising the employer that it should use its established formula in calculating the bonuses, and the employer applied that formula and "legitimately determined that no year-end bonus was earned for 1990"[38] – a result implicitly contemplated by the union by its agreement to forgo a 1990 bonus if one were not granted to the nonunion employees. Further supporting the conclusion that the bonus program was not unlawfully discontinued was the fact that the employer granted the bonuses the following year.

Similarly, in *Stone Container* the employer did not propose to discontinue permanently the annual April wage increase program that was an established condition of employment in that case, and the Board therein specifically distinguished the instant case on that basis. Rather,

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[38] 311 NLRB at 483.

following the union's July 1988 certification, the employer acceded to the union's request to bargain about the April 1989 increase and, in response to the union's proposal that "it would not protest the granting of a wage increase in April" (id. at 336), the employer undertook its "annual wage and benefit survey" (id.) and proposed for economic reasons that it could not give an increase *that April*.[39]

Thus, the critical distinction between the present facts and those operative in *Stone Container* and *American Packaging* is that the latter two employers applied the preexisting system for granting raises while the Respondent did not. The absence of increases in *Stone Container* and *American Packaging* flowed from the employers' application of their merit review program, not, as here, from the Respondent's unilateral decision to withhold raises even if the raises would have been given under an application of the preexisting merit raise program.[40]

American Mirror is factually inapposite here because that case did not concern a merit wage increase program that was a term and condition of employment. Rather, the raises there had been given at random irregular intervals in the past and, hence, the employer's withholding of them did not constitute a change, as here, in a clearly

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[39] The trend of the April wage increase had been progressively downward from 6 percent when first given in 1984 to 2 percent when last given in 1988.

[40] Unlike our concurring colleagues, we find it unnecessary in this case to address the Board's discussion in *Stone Container of Bottom Line Enterprises*, 302 NLRB 373 (1991).

established pattern that had become a term of employment. See, e.g., *Postal Service*, 261 NLRB 505 (1982); *Ithaca Journal-News*, 259 NLRB 394 (1981).

Finally, the Board in its first decision in this case distinguished *Anaconda Ericcson Inc.*[41] on the basis that the amounts of the raises therein were discretionary, the parties during negotiations had begun bargaining over wages, and the union did not unconditionally agree to the wage increase. The court found this attempted distinction by the Board "cursory" and that "[n]one of these three factors seems to explain the different outcomes" in the two cases. 979 F.2d at 1575.

Upon reconsideration, we agree with the court that it is not possible to reconcile the Board's decision in *Anaconda Ericcson* with the Board's other decisions in this area, discussed above. The December 1 wage increase in *Anaconda* was a term and condition of employment, and the employer was obligated to bargain with the union over the amount of the increase. The union's proposal of an 85-cent increase and the employer's counterproposal of a 5-cent increase did not, as the court noted in its decision, constitute an impasse in bargaining or a waiver of the union's right to bargain. In no event was the employer privileged to decide unilaterally to withhold a wage increase from its employees altogether as it did. Accordingly, we overrule *Anaconda* to the extent that the decision addresses the unilateral discontinuance of merit increases.

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[41] 261 NLRB 831 (1982).

II. THE ECONOMIC DEFENSE AND THE REMEDY

In addition to the *Katz* issue, the court invited the Board on remand to address two additional issues not raised by the parties but having "an obvious bearing on the internal logic of the Board's policy." 979 F.2d at 1576. The first issue deals with the court's concern as to how the Board can devise an acceptable remedy, assuming a violation here, that makes employees whole for the loss of a wage increase that is based on employer discretion. The second issue posed by the court is whether the unilateral discontinuance of the merit wages should be regarded as a lawful economic bargaining weapon.

A. *Fashioning an Appropriate Remedy in this Case is Feasible*

Pursuant to the Board's established and court-approved policy, "in cases, like here, involving a violation of Section 8(a)(5) based on a respondent's unilaterally altering existing benefits, it is [customary] to order restoration of the *status quo ante* to the extent feasible, and in the absence of evidence showing that to do so would impose an undue or unfair burden upon the respondent."[42] Such a remedy in the form of a reimbursement order for lost wages is warranted to "prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining undue advantage at the bargaining table

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[42] *Allied Products Corp.*, 218 NLRB at 1246 (1975), enfd. 548 F.2d 644 (6th Cir.1977). See also *NLRB v. Central Illinois Public Service Co.*, 324 F.2d 916, 919 (7th Cir.1963), and cases cited therein.

when he bargains about the benefits which he has already discontinued."[43]

To remedy the violation found in this case, the Board applied these policy considerations by ordering that the employees be paid the "difference between their actual wages and the wages they would have otherwise received" if the merit increases had not been unilaterally discontinued. The court, however, questioned how the Board proposed to enforce its order since, inasmuch as the amounts of the withheld merit raises were determined by employer discretion, determining the amounts of the withheld wage increases that are based on discretion is "unascertainable." 979 F.2d at 1577.

We do not share the court's pessimism. The court's hypothesis is based on the premise that if a backpay award cannot be determined with precision, one should not be awarded. We disagree. A "backpay award is only an approximation, necessitated by the employer's wrongful conduct."[44] Therefore, the "Board is required only to adopt a formula which will give a close approximation of the amount due . . . ; it need not find the exact amount due."[45]

Contrary to the court, we find that the Board's remedial order will enable a backpay award to be ascertained

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[43] *John Zink Co.*, 196 NLRB 942 (1972); *Herman Sausage Co.*, 122 NLRB 168, 172 (1958), enfg. 275 F.2d 229 (5th Cir.1960).

[44] *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir.1977).

[45] *NLRB v. Overseas Motors*, 818 F.2d 517, 521 (6th Cir.1987), citing *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir.1963).

for each employee affected by the Respondent's unlawful conduct. Thus, it will be recalled that although the Respondent discontinued granting merit increases to the editorial employees at issue here, it continued to issue annual merit reviews to them and to all its unrepresented employees. Pursuant to those reviews, the Respondent also continued to grant merit increases to its unrepresented employees. This information, along with other factors, such as the amounts of the merit increases awarded to the editorial employees during the years prior to their discontinuance, should be sufficient to enable the General Counsel at the compliance proceeding to construct a formula which will give a close approximation of the amount due. See, e.g., *Overseas Motors*, supra at 520.[46]

B. *Unilateral Conduct is not a Permissible Economic Weapon for Bargaining*

The second issue which the Board was invited to consider on remand is whether the unilateral discontinuance of the merit wages should be regarded as a lawful economic bargaining weapon in the same sense that the "harassing tactics" employed in *NLRB v. Insurance Agents' International Union (Prudential Insurance Co.)*[47] and the lockout invoked in *American Ship Building Co. v. NLRB*[48] were found to be lawful economic weapons. For the

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[46] See also *NLRB v. Iron Workers Local 433*, 660 F.2d 770 (9th Cir.1979).

[47] 361 U.S. 477 (1960).

[48] 380 U.S. 300 (1965).

reasons set forth below, we conclude that such unilateral action is not a lawful economic weapon.

The court in the instant case noted that in *Lane v. NLRB*[49] it applied *American Ship* to find that a preimpasse lockout does not violate Section 8(a)(3) as long as it satisfied the standard set forth in *NLRB v. Great Dane Trailers*,[50] i.e., the employer is not motivated by union animus and the lockout has both a "legitimate and substantial business justification" having an impact on employees which is only "comparatively slight." The court reasoned, therefore, that if, as in *Lane*, a preimpasse lockout can be lawful under the test of *Great Dane*, "it makes no sense to have a *per se* ban on decreasing wages or benefits, which is clearly a less drastic economic weapon [and s]uch a policy defies not only logic but also the . . . admonition in *Insurance Agents'* not to distinguish a 'greater' economic weapon, such as a strike or lockout, from a 'lesser' economic weapon." 979 F.2d at 1577.

It must be remembered, however, that the balancing test of *Great Dane* applies only to analyzing whether Section 8(a)(3) has been violated. Therefore, if a lockout and a unilateral decrease in wages or benefits were subjected to the balancing test of *Great Dane*, and even assuming, arguendo, that a unilateral decrease in wages and benefits is a less drastic economic weapon than a lockout, then, perhaps, it might make no sense to have a

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[49] 418 F.2d 1208, 1212 (D.C.Cir.1969).

[50] 388 U.S. 26 (1967).

per se ban only on the former.[51] But in the instant case we are concerned only with whether the Respondent's unilateral action violated Section 8(a)(5), a violation of which does not turn on antiunion motivation or on any of the factors weighed under *Great Dane*'s balancing test in determining whether Section 8(a)(3) has been violated.[52] Rather, the question under Section 8(a)(5) simply is whether an employer has refused to bargain in good faith, and *Katz* has stated emphatically that it has not bargained in good faith when, as here, it acts unilaterally with respect to terms and conditions of work.

The Supreme Court decisions in *Insurance Agents* and *American Ship* confirmed the principle that although an employer and a union are both obligated under the Act to bargain in good faith, both parties may, without violating their duty to bargain, exert economic pressure on each

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[51] The Second Circuit, however, would disagree. In language that can be fairly described as holding that it is a per se violation of Sec. 8(a)(3) to unilaterally decrease wages and benefits, the court stated that, if such conduct was permitted

> an employer would appear to be entitled, in the hope of improving his bargaining position, to alter all conditions of employment after union certification, reducing wages to the legal minimum and allowing the work environment to deteriorate. The devastating impact that such action would have upon employee exercise of Section 7 rights is indisputable. While the business purpose would be "substantial," we could not characterize it as "legitimate." [*NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1110 (2d Cir.1973).]

[52] See *U.S. Gypsum*, 284 NLRB 4, 13 (1987) (the "applicable cases hold that an employer's motive is not an element essential to a finding that a unilateral change is violative of Section 8(a)(5)").

other in an effort to secure agreement to each others' bargaining proposals. In *Insurance Agents*, economic pressure took the form of half-day walkouts and refusals by employees to perform various job duties. The Court, reversing the Board's finding that the union's tactics constituted bad-faith bargaining under Section 8(b)(3), explained that during negotiations for a collective-bargaining agreement the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the . . . Act[ ] ha[s] recognized." 361 U.S. at 489. The Board was admonished that the authority granted it by Congress to enforce the statutory requirement that parties bargain in good faith did not include the power to outlaw the various forms of economic weaponry that the parties to the bargaining might summon to their aid.

This reasoning was applied subsequently by the Court in *American Ship* in assessing the legality of a postimpasse lockout as an economic weapon in support of an employer's bargaining position. The Board found that the lockout violated Section 8(a)(3) and (1) because it interfered with and discriminated against employees in the exercise of their protected right to bargain collectively. The Court reversed, finding no such interference with or discrimination against the employees' bargaining rights, and again, citing *Insurance Agents*, scolded the Board for improperly injecting itself into the bargaining process "to deny weapons to one party or the other because of its assessment of that party's bargaining power." 380 U.S. at 308. Although there was no issue involving Section 8(a)(5) in *American Ship*, the Court stated in dicta that its holding in *Insurance Agents* had

"even more direct application to the Section 8(a)(5) question" than it did to the 8(a)(3) question in *American Ship*.

Thus, while the Supreme Court has made clear in *American Ship* and *Insurance Agents* that the Board is not warranted in becoming involved in the substantive aspect of the bargaining process by "functioning as an arbiter of the sort of economic weapons the parties may use in seeking acceptance of their bargaining demands,"[53] it is also clear that not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of one's bargaining position. This point was emphasized in *Katz* where the Court was careful to note that the availability of economic weaponry under *Insurance Agents* is subject to one crucial qualification – the party utilizing it must at the same time be engaged in lawful bargaining. Thus, while recalling that in *Insurance Agents* it found that the Board may not decide the legitimacy of economic pressure tactics "in support of genuine negotiations," *Katz* made clear that the Board "*is* authorized to order the cessation of behavior which is in effect a refusal to negotiate." 369 U.S. at 747. The Court emphasized that in dismissing the refusal-to-bargain allegation in *Insurance Agents*, the union therein, unlike the employer in Katz, "had not in any way foreclosed discussion of any issue, by unilateral actions or otherwise." Id.[54]

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[53] *American Ship*, 380 U.S. at 317, quoting from *Insurance Agents*, 361 U.S. at 497.

[54] A number of writers on this issue have also noted that in *American Ship* and *Insurance Agents* the Supreme Court adopted a long held academic view that the Board should not attempt to

Similarly, in upholding the legality of the lockout as an economic weapon in *American Ship*, the Court thought it important to stress the employer's "legitimate bargaining position" (380 U.S. at 310) and to observe that there was "no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining," thus specifically distinguishing cases "where the Board has concluded on the basis of substantial evidence that an employer has used a lockout as a means . . . to evade his duty to bargain collectively." (Id. at 308.) Accordingly, the Court concluded that use of the lockout was not "inconsistent with the right to bargain collectively" (id. at 310) because the sole purpose of its use was "merely to bring about a settlement of a labor dispute on favorable terms." (Id. at 313.)

Thus, since the Respondent's unilateral action in this case was "inconsistent with the right to bargain collectively" under Section 8(a)(5), such action is not privileged under a *Great Dane* analysis and such analysis is unwarranted.

The court invited the Board also to consider Professor Gorman's observation that in two similar cases where the Board and this court found violations for the denial of

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determine what economic tactics should be used in negotiations as long as the parties are otherwise engaged in a lawful effort to reach an agreement. See, e.g., George Schatzki, *The Employer's Unilateral Act – A Per Se Violation Sometimes*, 44 Tex.L.Rev. at 485 (1966); Walter E. Oberer, *Lockouts and the Law: The Impact of American Ship and Brown Food*, 51 Cornell L.Q. 193 (1966); William B. Gould IV, *A Primer on American Labor Law* 100-103 (3d ed. 1993).

economic benefits during bargaining,[55] the "tribunal[s] . . . [may have] engag[ed] in the kind of 'picking and choosing' among allowable economic weapons for which the Board was reprimanded in [*Insurance Agents* and *American Ship Building*]." 979 F.2d 1578, quoting Robert A. Gorman, Basic Text on Labor Law 434 (1976).

Contrary to Professor Gorman's suggestion, the Board and court decisions in *Borden* and *Molders Local 155* represent a straightforward application of *Katz*. The judge in *Borden* specifically rejected the employer's contention that an *American Ship* analysis should be applied in deciding whether the employer's unilateral cancellation of its employee insurance benefit program violated Section 8(a)(5). Similarly, in *Molders Local 155*, the court, having found that the employer's unilateral withdrawal of fringe benefits and wage increases for the admitted purpose of inducing employees to strike in violation of Section 8(a)(3), found that it necessarily followed that the unilateral action also violated Section 8(a)(5) and, therefore, concluded that "[u]nlike the situation in *Insurance Agents'*, then, there was in the present case 'some specific warrant for [the Board's] condemnation of the precise tactics involved here.' " 442 F.2d at 748.

Conclusion

For the foregoing reasons, we conclude that the finding of a violation in this case is based on a reasonable

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[55] *Borden Inc.*, 196 NLRB 1170 (1972), and *Molders Local 155 v. NLRB*, 442 F.2d 742, 748 (D.C.Cir.1971).

interpretation of *Katz* and, therefore, we affirm the Board's original decision.

ORDER

The National Labor Relations Board reaffirms the Board's original Order reported at 304 NLRB 511 (1991), and orders that the Respondent, The Daily News of Los Angeles, a Division of Cooke Media Group, Inc., Woodland Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBERS STEPHENS AND COHEN, concurring.

We join in the opinion for the majority except that we do not fully subscribe to the reasoning in the discussion concerning the bargaining obligation of an employer regarding a past practice that is scheduled to recur during negotiations for a contract. We write separately to state our views on the subject.

Where there is a past practice concerning an annual event (e.g., an annual wage increase), and the event is scheduled to recur during negotiations for a contract, the employer satisfies its bargaining obligation if it gives reasonable advance notice and opportunity to bargain about that scheduled event.[1] Assuming that the employer gives such notice and opportunity, it can implement its final proposal as to that matter even if the parties have not reached impasse, either overall or on the specific

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[1] See *Stone Container*, 313 NLRB 336 (1993). The employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year.

matter.[2] In essence, the time for the scheduled event arrives before the parties have reached impasse. In such circumstances, we would permit the employer to act "on schedule," so long as there has been a reasonable notice and opportunity for bargaining.[3]

On the other hand, if the employer's proposal is for a permanent change in the practice, i.e., a change that would operate in the current year and in future years, the employer cannot make the permanent change (so as to affect future years) until an impasse has been reached.

In the instant case, the Respondent changed the practice for the current year without reasonable notice and opportunity to bargain. In addition, the Respondent made a permanent change, affecting future years, without reaching an impasse. Accordingly, under the tests set forth above, we conclude that the Respondent's conduct was unlawful.

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[2] Of course, absent impasse, the employer may have to continue bargaining after implementation, and such bargaining could include demands for retroactive application of any agreement ultimately reached.

[3] We agree with our colleagues that the employer in *Anaconda Ericcson*, 261 NLRB 831 (1982), violated the Act, but our conclusion rests solely on the fact that the implemented increase there differed from the final offer.

The DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

Los Angeles Newspaper Guild, Local 69, AFL-CIO, Intervenor.

No. 91-1456.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 11, 1992.

Decided Dec. 11, 1992.

Petition for Review of an Order of the National Labor Relations Board (31-CA-17751).

Thomas P. Burke, with whom Jamie L. Johnson was on the brief, for petitioner.

Michael J. Gan, Atty., N.L.R.B. ("NLRB"), with whom Jerry M. Hunter, Gen. Counsel, Aileen A. Armstrong, Deputy Associate Gen. Counsel, and Paul J. Spielberg, Deputy Asst. Gen. Counsel, NLRB, were on the brief, for respondent.

Ellen Greenstone, David S. Barr, and David Jonathan Cohen were on the brief, for intervenor.

Before: BUCKLEY, WILLIAMS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

Since 1986 the Daily News has given each employee an annual performance review, almost invariably on the anniversary of the employee's hire. The review was typically the occasion of a merit raise, but the company denied raises to 18.5% of eligible employees in 1986 and to 17.3% in 1987. Joint Appendix ("J.A.") 409-10. For those receiving raises, the percentage increases were all over the lot, from as low as 2% to as high as 40%. *Id.* The administrative law judge, in a conclusion that the Board did not overturn, found that "the amount of the increase, if any, is totally discretionary." J.A. at 69.

In May of 1989 the Los Angeles Newspaper Guild, Local 69, was certified as the collective bargaining agent for some of the company's editorial employees. During negotiations in June 1989, the company asked the Guild's opinion on the possible discontinuation of merit increases. The Guild responded that the News should continue to grant the increases as before, and that the Guild would view any failure to do so as an unfair labor practice. While the News continued its annual employee evaluations, it stopped giving merit raises shortly after this exchange. The Guild then filed a complaint with the National Labor Relations Board, claiming the News's conduct violated § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1988), which bars an employer from refusing to bargain collectively with its employees' representatives.

Over the dissent of member Oviatt, the Board found the News to have violated § 8(a)(5). *Daily News of Los*

Angeles, 304 NLRB No. 63 at 1 (1991) (the "Board Decision"). Its reasoning was in essence the following: (1) Under *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962), an employer negotiating with a newly certified bargaining representative is barred by § 8(a)(5) from altering "established terms and conditions of employment without first notifying and bargaining with the union." Board Decision, 304 NLRB No. 63 at 1-2. (2) A merit raise is an "established term" of employment within the meaning of *Katz* if the *timing* is settled, even though the *amount* is discretionary. *Id.* at 2. (3) Under *Katz* the employer violates its bargaining obligation whenever it unilaterally (i.e., without bargaining to impasse) either continues or discontinues such discretionary raises. *Id.* (4) While the union may insist on bargaining over the amounts of (quantitatively) discretionary wage increases, it may waive that right, and where it does so – as the Board found it did here – the employer is obliged to grant the increases and exercise its discretion as to amount. *Id.* at 3. (5) The remedy – awarded by the Administrative Law Judge and incorporated by reference in the Board Decision – is for the News to pay the affected employees "the difference between their actual wages and the wages they would have otherwise received." *Id.* at 5 (requiring the action set forth in ALJ's order at 5); see also ALJ Decision, J.A. 97, 101.

While virtually every step in the Board's reasoning poses difficulties, the core problem lies in steps 2 and 3. The Board's conclusion – that an employer cannot in the course of negotiations discontinue a practice of granting wage increases whose timing is regular but whose amount is discretionary – is inconsistent with recent

Board precedent and is by no means compelled by the logic of Katz. We therefore remand to the Board for reconsideration in light of this opinion.

* * *

Katz found that an employer's *persistence* in a program of discretionary merit wage increases violated its good faith bargaining duty (and thus § 8(a)(5)) where the employer failed to bargain in advance about the decision to persist. It carefully distinguished "so-called 'merit raises' which are in fact simply automatic increases". 369 U.S. at 746, 82 S.Ct. at 1113. Because of the employer's discretion in the case before it, the Court said that there "simply is no way . . . for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases." *Id.* at 746-47, 82 S.Ct. at 1113 (citations omitted).

The stress on the union's uncertainty built on earlier portions of the opinion. One part had found unlawful a company's complex alteration of its sick leave policy; its complexities would affect different employees different ways, with adverse effects on the bargaining whether it generally helped the employees, generally hurt them, or divided them about equally. *Id.* at 744, 82 S.Ct. at 1112. A second part, following *NLRB v. Crompton-Highland Mills Inc.*, 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320 (1949), had invalidated a unilateral wage increase that "was considerably more generous than that which had shortly theretofore been offered to and rejected by the union." 369 U.S. at 745, 82 S.Ct. at 1112. Because such a unilateral increase

looked like a maneuver to convince workers that they could do better without a union than with one, see Robert A. Gorman, Basic Text on Labor Law 439 (1976), and because the sick leave change suggested a divide-and-conquer strategy, the Court might well have thought that unilateral persistence in a pattern of discretionary wage increases had elements of both tactics. The emphasis on the union's uncertainty suggests as much. As the *Katz* opinion said not a word about *discontinuance* of a past pattern of discretionary wage increases, and its focus was on evils that arise from continuance rather than from discontinuance, one can hardly assume that it covers the latter. The Board here offered no explanation of the extension.

Rather, it appeared to rest on a faulty assumption that it had already resolved the matter, citing a footnote in *Oneita Knitting Mills*, 205 NLRB 500 (1973). There as in *Katz* the employer unilaterally granted discretionary wage increases during negotiations with the union, so the decision is clearly not a holding on the present issue. The *Oneita* footnote addressed a claim by the respondent that treating a unilateral grant of merit increases as a violation was inconsistent with the Board's decision in *Southeastern Michigan Gas Company*, 198 NLRB 1221 (1972), where the Board had found discontinuance to be a violation. The Board responded:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan*) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is

> selected. *NLRB v. Katz*, 396 [369] U.S. 736 [82 S.Ct. 1107, 8 L.Ed.2d 230] (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

205 NLRB 500 n. 1 (1973). But the discontinued wage increases in *Southeastern Michigan* were part of a "policy upon making such a [performance] review to grant to employees a wage increase of 5 percent." 198 NLRB at 1221. No eligible employee was ever denied the five percent increase. *Id.* Thus, the authority cited in *Oneita* that bars discontinuance of increases referred to an established pattern of *fixed*, nondiscretionary raises. Indeed, *Southeastern Michigan* conformed to the observation in the text of *Oneita* that the employer could have unilaterally granted the raises had the amounts been "fixed" or "automatically determined". 205 NLRB at 502; see also *Katz*, 369 U.S. at 746, 82 S.Ct. at 1113 (distinguishing "automatic increases to which the employer has already committed himself"). And the final sentence of the *Oneita* footnote, while requiring bargaining as to implementation if the employer proposes to grant discretionary increases (as per *Katz*), says nothing about the employer's duty if it does not wish to do so.

Thus, while *Katz*, *Oneita*, and *Southeastern Michigan* stand for the propositions that an employer may not unilaterally *continue* discretionary increases, and may not unilaterally *discontinue* established and nondiscretionary

ones, none of them addresses the discontinuance of discretionary merit increases.

It is quite true, as the Board noted, that in certain cases it has applied *Katz* to an employer's discontinuance of "merit" raises that had normally occurred at regular intervals but as to which the employer retained some discretion. See Board Decision, 304 NLRB No. 63 at 3 (citing *Central Maine Morning Sentinel*, 295 NLRB 376 (1989); *General Motors Acceptance Corp.*, 196 NLRB 137 (1972); *Allied Products Corp.*, 218 NLRB 1246 (1975); *Rochester Institute of Technology*, 264 NLRB 1020 (1982), enf. denied, 724 F.2d 9 (2d Cir.1983)). In those cases the range of discretion as to amount appears narrower than here; in *Rochester*, for example, everyone received between 10 and 25 cents per hour, depending upon performance rating. Further, none of the cases can fairly be said to explain the extension of *Katz* to discontinuance of merit increases. Most important, the Board has also come out exactly the opposite way, in *Anaconda Ericsson, Inc.*, 261 NLRB 831 (1982), discussed in detail below. If there is a reconciliation of these cases, the Board has nowhere advanced it. While random use of inconsistent precedents may or may not be an agency "swerve[ ]", see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), it surely is not reasoned decisionmaking; see also *Green County Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237 (D.C.Cir.1985); *Professional Airways Systems Specialists v. FLRA*, 809 F.2d 855, 860 (D.C.Cir.1987).

Our own decision in *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173 (D.C.Cir.1981), suggests some further wrinkles but proves in the end quite ambiguous; this ambiguity may explain why subsequent Board authority has not

found *Blevins* to support the broad rule that the Board now suggests. In *Blevins* we read *Katz* as establishing the general proposition that "if the company decides to alter a preexisting practice, it must give the union an opportunity to bargain over the change." *Id.* at 1189. More particularly, we read it (consistently with *Katz*, *Oneita*, and *Southeastern Michigan*) to require an employer to grant automatic wage increases unless it first negotiated any change with the union, but to bar it from granting a discretionary increase absent such negotiation. *Id.* In *Blevins* itself, the wage increases at issue were ones granted regularly every December and the amounts "apparently depended on an employee's job classification". *Id.* Thus, they were "not entirely automatic". *Id.* If the company had proposed to grant the increases, we said, it would have had to "bargain over this discretionary element". *Id.* Failure to grant the increases, coupled with a statement to the union that the company would not make any increases " 'that the law prohibits' ", would not satisfy its duty under *Katz*, for it was not "prohibit[ed]" from granting increases if it consulted with the union. *Id.* at 1190. In the end, we remanded the case to a Special Master, telling him to "direct his attention to the precise nature of the annual wage increase," and noted that if the employer's action was not "justified", "then the company's action *may* be evidence of an attempt to undermine the union, and indicative of bad faith." *Id.* (emphasis added).

Thus *Blevins* appears to mean that the Board could lawfully insist that an employer treat a wage increase as "established", and not subject to discontinuance without bargaining, even though it contained *some* discretionary

elements. The court never passed on just how broad the discretion might be. The opinion does *not* say that *Katz* works identically for discontinuances as for grants. Nor does it undermine the Board's position, established in *American Mirror Co.*, 269 NLRB 1091, 1094 (1984), that a company may unilaterally refrain from granting a wholly discretionary increase.

Accordingly, the issue appears to turn on how to classify an established pattern of increases that is fixed as to timing but discretionary as to amount. In fact, the Board has treated such programs as lacking the character of an established practice, for purposes of rejecting both an employer's attempt to justify a unilateral grant of such increases and a union's attack on unilateral discontinuance.

In *Oneita,* the very case on which the Board purports to rest its decision, it held the employer to have violated the Act by unilaterally granting merit increases in late January in the midst of bargaining. The employer tried to defend the raises on the grounds that it had established a practice of giving them at that time of year. 205 NLRB at 502. The Board rejected the defense, noting that the discretion as to amount created precisely the uncertainty that had concerned the Court in *Katz. Id.*

Consistently with *Oneita,* the Board held in *Anaconda Ericsson, Inc.*, 261 NLRB 831 (1982), that an employer could unilaterally withhold wage increases that had been granted annually for the past five years but which were "apparently" discretionary as to amount. *Id.* at 834.

Oneita and *Anaconda* thus suggest a quite coherent line. Where the company unilaterally persisted in a pattern of regular wage increases that were discretionary in amount it lost (*Oneita*), and where it unilaterally discontinued such increases it won (*Anaconda*). While the outcome here could be reconciled with *Oneita* on the theory that the employer must bargain whether it wishes to continue or discontinue the practice, it cannot readily be reconciled with *Anaconda*.

The Board makes only a cursory attempt to distinguish this case from *Anaconda*, repeating verbatim in its brief the three distinctions advanced in its decision below: "in *Anaconda* . . . [1] the employer lawfully withheld wage increases where the amounts were discretionary, [2] the parties during negotiations had begun bargaining over wages, and [3] the union did not unconditionally agree to the wage increase." Board Decision, 304 NLRB No. 63 at 4; Respondent's Brief at 18. None of these three factors seems to explain the different outcomes.

First, here as in *Anaconda* the ALJ found that the raise amounts were discretionary. This is, then, no distinction at all. The Guild argues that here the raises are not in fact discretionary because the company used a standardized rating system to evaluate employee performance. Intervenor's Brief at 3-6. But the rating system would contradict the discretionary character of the raises only if (a) the ratings themselves were substantially free of subjectivity, and (b) specific ratings corresponded systematically with specific percentage increases. In fact, however, the ratings simply involved four vague rankings (Fails to meet standards; Needs improvement to meet standards; Meets

standards; and Exceeds standards; see *id.* at 4), and the Guild does not even claim that each ranking carried a fixed percentage. On this score, then, the case is indistinguishable from *Anaconda*.

Second, the extent of bargaining over wages before the discontinuance appears roughly identical in both cases. In *Anaconda* the union demanded the discretionary increase, saying that if it were inadequate the union would negotiate for more. The company replied that it would give no increase "unless [it were] negotiated, that the Union had not yet presented its wage demands, and that [the company] would not negotiate on the basis of a retroactive increase." 261 NLRB at 834. The union replied with a demand for an 85-cent wage increase, to which the company responded with a 5-cent offer. Except for a "brief discussion . . . concerning the future of the current incentive wage plan", there was no further colloquy. *Id.*

Here, similarly, the parties were directly at loggerheads over the discretionary wage increase but did not get into bargaining over other aspects of potential wage dispute. Although here there was no parallel to the exchange in *Anaconda* of an 85-cent demand and a 5-cent offer, the cases are similar in that in neither was there anything like bargaining to an impasse, which would have ended the employer's duty to maintain established conditions. See Gorman, *supra*, at 445-50. Thus the distinction between the two cases appears trivial. Moreover, the Board has nowhere explained why different amounts of pretermination wage bargaining should lead to different outcomes.

Third, the Guild no more waived its right to bargain over the increase here than did the union in *Anaconda*. The Guild's own post-hearing brief explicitly contradicts the Board's finding of waiver, saying, "Although the Guild told the Employer it expected the paper to continue exercising its discretion, the Guild would retain the right to demand to bargain over specific merit raises." J.A. at 60 n. 8. The record is quite consistent with the Guild's claim. Its representative said that it wanted "current . . . conditions to prevail. For example, if currently an employee gets four percent, they should not get one percent." *Id.* at 208-09. This indicates that as stated in the Guild's post-hearing brief, it reserved its right to negotiate over the amounts of individual raises. This seems to closely track the union's position in *Anaconda* – its insistence that if the discretionary increases were inadequate it would negotiate for more. See 261 NLRB at 834. Even without regard to the Board's traditional position that waiver of a bargaining right can be found only on a "clear and unmistakable" showing, see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Intermountain Rural Elec. Ass'n*, 305 NLRB No. 107 (1991) at 4; *Leland Stanford Jr. University and United Stanford Workers, SEIU*, 307 NLRB No. 8 (1992), we cannot find substantial evidence of the supposed waiver.

We note, in any event, that the Board's understanding of the role of waiver is unclear. Since *Katz* requires the employer to consult the union before granting discretionary wage increases, waiver by the Guild would have *allowed* the company to do so if it wished. But it is not clear under *Katz* why such a waiver should *force* the

company to grant the increases against its will, as the Board asserts. Respondent's Brief at 15-16.

As none of the three factors named by the Board serves to distinguish *Anaconda*, the Board appears either to have altered course without the "reasoned analysis" required for such a switch, *Greater Boston*, 444 F.2d at 852, or, if the *Central Maine* line of cases has the meaning that the Board now suggests, see above at 1573-74, to have been hopping at random from one view to another. We therefore remand the case to the Board for consideration of whether an employer is bound under *Katz* to persist in a merit raise program that is entirely discretionary as to amount.

* * *

There are two issues that no party has raised but that the Board may wish to address on remand because of their obvious bearing on the internal logic of the Board's policy. The first relates to the remedy that the Board may afford if the employer's conduct violated § 8(a)(5), the second to the relation between the rule against unilateral changes (as in *Katz*) and the doctrine that both union and employer are free to use economic weapons of their own choice in the bargaining process. See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965).

1. *Remedy.* It will be recalled that in *Katz* Justice Brennan had expressed particular concern that if an employer pressed ahead with discretionary wage increases there "simply is no way . . . for a union to know whether or not there has been a substantial departure

from past practice." 369 U.S. at 746, 82 S.Ct. at 1113. Given employer discretion over the amount of the increase, the union can find no benchmark against which to measure the raises offered. The ALJ in *Anaconda Ericsson* noted that the uncertainty had an impact on the remedy, observing that "the General Counsel does not suggest what relief might be appropriate, where, as here, the amount of the increase apparently is discretionary." 261 NLRB at 834. Given the ALJ's finding here that the amounts of raises in the past practice were "totally discretionary", J.A. 69, it is altogether unclear how the ALJ or the Board would enforce its order that the News pay the employees "the difference between their actual wages and the wages they would have otherwise received", *id.* at 101, as the latter by hypothesis are unascertainable.

2. *Relation to doctrine on parties' choice of economic weapons.* Two leading decisions of the Supreme Court have emphatically denied the Board the power, under the guise of enforcing the duty to bargain in good faith, to "regulate what economic weapons a party [to the bargaining] might summon to its aid." *Insurance Agents' Int'l Union*, 361 U.S. at 490, 80 S.Ct. at 427. There the Court treated the Board's effort to draw some distinction between "proper and 'abusive' economic weapons" as an impermissible entry of the Board "into the substantive aspects of the bargaining process." *Id.* at 497-98, 80 S.Ct. at 431-32; see also *American Ship Building Co. v. NLRB*, 380 U.S. at 317-18, 85 S.Ct. at 967 (quoting above statement).

In *Insurance Agents'* a union had mobilized its members in certain "harrassing tactics" that involved failure to perform substantial parts of their duties and that the Court assumed were not "protected" activities under the

Act. See 361 U.S. at 480, 492, 80 S.Ct. at 422, 428. The Board held that the union's activities were a refusal to bargain collectively in violation of § 8(b)(3), but the Court reversed. The obligation to bargain in good faith did not, it found, encompass a duty to refrain from measures putting economic pressure on the employer, even where the measures were not explicitly protected by the Act, as a strike would have been. 361 U.S. at 492-96, 80 S.Ct. at 428-31. The Court emphatically rejected any idea that the Act gave the Board a general power to judge the permissibility of either side's economic weapons.

In *American Ship Building* the Court extended the *Insurance Agents'* analysis to an *employer*'s choice of economic weapons, to wit, a lockout. Although the Board's findings related only to claims under §§ 8(a)(1) & 8(a)(3), the complaint had asserted a violation of § 8(a)(5) as well, and the Court went out of its way to state that the *Insurance Agents'* reasoning "has even more direct application to the § 8(a)(5) question." 380 U.S. at 306 n. 5, 85 S.Ct. at 961 n. 5. We have applied *American Ship Building* to a lockout occurring *before* impasse, finding it valid so long as it was justified by " 'legitimate and substantial' business" interests and its impact on employees was "comparatively slight"[1] and there was no showing of anti-union motive. *Lane v. NLRB*, 418 F.2d 1208, 1212 (D.C.Cir.1969). If the legitimacy of a pre-impasse lockout depends upon whether the employer's legitimate and

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[1] Thus negating a claim that the lockout was "inherently destructive" of employee rights under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 27, 87 S.Ct. 1792, 1794, 18 L.Ed.2d 1027 (1967).

substantial business interests outweigh the resulting impairment of employee rights, i.e., if a pre-impasse lockout is subjected to the balancing test announced in *Great Dane*, then it makes no sense to have a *per se* ban on decreasing wages or benefits, which is clearly a less drastic economic weapon. Such a policy defies not only logic but also the Supreme Court's admonition in *Insurance Agents'* not to distinguish a "greater" economic weapon, such as a strike or lockout, from a "lesser" economic weapon. Although the Board has since struck down employer use of the "lesser" economic weapon of a wage or benefit decrease as *per se* unlawful, *Borden, Inc.*, 196 NLRB 1170 (1972), and we have upheld a Board order on similar reasoning, see *Local 155, Int'l Molders and Allied Workers Union v. NLRB*, 442 F.2d 742, 748 (D.C.Cir.1971), the Board, if it addresses this issue, may want to consider Professor Gorman's observations on those decisions:

> The attempt in these appellate and Board cases to distinguish away the Supreme Court decisions in *Insurance Agents'* and *American Ship Building* is not wholly persuasive, and their discussion concerning the "lesser" or "greater" impact of the lockout in comparison to the denial of economic benefits invites the conclusion that the tribunal deciding the case was engaging in the kind of "picking and choosing" among allowable economic weapons for which the Board was reprimanded in those two Supreme Court decisions.

Gorman, *supra*, at 434.

* * *

The Board's finding of a violation of § 8(a)(5) in the News's discontinuance of periodic but discretionary merit raises conflicts with its precedents; we remand the case for the Board to consider that conflict. We invite the Board in the course of reconsideration to address the consistency of the remedy (if any) with the reasoning of *Katz* and the relation of its analysis to the doctrine of *Insurance Agents'* and *American Ship Building*.

So ordered.

The Daily News of Los Angeles, a Division of Cooke Media Group, Inc. *and* Los Angeles Newspaper Guild, the Newspaper Guild Local 69, AFL-CIO, Case 31-CA-17751

August 27, 1991

DECISION AND ORDER

MEMBERS, CRACRAFT, DEVANEY, AND OVIATT

On March 28, 1990, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

Contrary to our dissenting colleague, we agree with the judge, for the reasons stated by him, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withholding annual merit wage increases from unit employees. While not explicitly set forth by the judge, two well-settled legal principles, both enunciated by the Supreme Court in its decision in *NLRB v. Katz*, 369 U.S. 736 (1962), underlie the judge's analysis. First, an employer negotiating with a newly certified bargaining representative is prohibited under Section 8(a)(5) from altering established terms and conditions of employment without first notifying and bargaining with the union.

Second, merit increases are included in this prohibition unless they "are in fact simply automatic increases to which the employer has already committed himself. . . ." *Katz*, supra at 746.

The Board has made it clear that the same bargaining obligation applies whether the issue involved is the employer's unilateral granting of merit increases or its unilateral discontinuance of them. As the Board explained in *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973):

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *NLRB v. Katz*, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program; however, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases) becomes a matter as to which the bargaining agent is entitled to be consulted.

Thus, once the judge found that the Respondent had "a pattern and practice of evaluating the unit employees at the time of each employee's anniversary date," he correctly concluded that the Respondent was required to maintain that practice, absent an agreement with the Union to the contrary. Given the Union's specific request that the Respondent continue its merit wage program during negotiations, it clearly did not agree to any discontinuance of that program.

The dissent mischaracterizes several of the judge's findings. First, the judge did not find that the Respondent's merit wage program was "purely discretionary." Although the judge found that the amount that an employee would receive was discretionary, he found that the *timing* of the increase – at the employee's annual evaluation – was not discretionary and thus that the merit wage program had become an established term and condition of employment.

The dissent also mischaracterizes the judge's finding that the Union "specifically waived any objection or legal position it may have otherwise taken on the matter of merit increases." The Union agreed to the Respondent's continuing exercise of its discretion in unilaterally determining the *amount* of each employee's merit increase based on his or her annual evaluation. Absent this agreement, the Respondent would have been obligated, as explained in Oneita, to bargain with the Union over this discretionary aspect of the merit wage program. In light of this agreement, however, the Respondent was privileged to *grant* merit wage increases at the employee's annual evaluation without bargaining with the Union. It was in this context that the judge found that the Union had waived its bargaining rights over the Respondent's granting of merit wage increases.

The Board cases relied on by the judge are consistent with the legal principles discussed above. Thus, in *Central Maine Morning Sentinel*, 295 NLRB No. 42376 (1989), the Board found that the employer unlawfully withheld a wage increase from unit employees where the granting of the increase had become an established practice, although the amount of the increase was discretionary. In *General*

Motors Acceptance Corp., 196 NLRB 137 (1972), *Allied Products Corp.*, 218 NLRB 1246 (1975), and *Rochester Institute of Technology*, 264 NLRB 1020 (1982), enf. denied 724 F.2d 9 (2d Cir. 1983), the Board found that the employers unlawfully discontinued their merit wage programs during negotiations with newly certified unions.

Similarly, the cases relied on by the Respondent and our dissenting colleague are distinguishable from the present case. As noted by the judge, in *American Mirror Co.*, 269 NLRB 1091 (1984), the Board found no violation in the employer's withholding of wage increases where the increases were not an established practice because of their variance in past years as to both timing and amount. And in *Anaconda Ericson, Inc.*, 261 NLRB 831 (1982), the Board found that the employer lawfully withheld wage increases where the amounts were discretionary, the parties during negotiations had begun bargaining over wages and the union did not unconditionally agree to the wage increase. Finally, the dissent's conclusion that the Union in this case sought "the best of both worlds" misses the mark. What the Union sought was nothing more than what the Board and courts require the Respondent to do, namely, to maintain the existing terms and conditions of employment pending negotiated changes in past practice or an impasse in bargaining. The Respondent, on the other hand, agreed to defer bargaining over economic issues until after bargaining over non economic issues and then unilaterally changed the wages of unit employees. As the Board stated in *Central Maine Morning Sentinel*, supra at 376, "Simply stated, what the Respondent did here was to confront the Union with an obligation to make a decision on a proposed wage increase

before the bargaining over noneconomic issues was concluded."

For these reasons, we adopt the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally discontinuing its merit wage program.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Daily News of Los Angeles, A Division of Cooke Media Group, Inc., Woodland Hills, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting

My colleagues have adopted the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by not continuing a discretionary wage increase program during negotiations for a collective-bargaining agreement.[1]

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[1] The majority apparently misapprehends my conclusion, infra, that the judge found that even though "the application of the merit pay program was purely discretionary the Respondent was required to continue it." First, "application" is defined as "the act of applying: specifically, . . . b, the act of putting something to use." (Webster's New World Dictionary (2d College ed. 1972)). That is indeed precisely what is involved here. Second, the judge stated that the Respondent maintained the policy of its predecessor in annually evaluating the performance of each employee at the time of the employee's anniversary date. I readily concur with Counsel for the General Counsel in saying that that is "generally" the case. However, the

From January 1, 1986, to the commencement of the negotiations with the Union on June 14, 1989, the Respondent operated under a policy of evaluating the performance of each employee, usually on an annual basis. The performance review, together with a recommendation for a salary increase, if any, was submitted to the Respondent's editor for final approval. Any resulting salary increase was based on the perceived efforts and ability of the individual employee, and his or her value to the newspaper. Whether to give any increase, and the amount, was totally discretionary and varied among the unit employees.

Respondent also at its option can, and has, evaluated employees more frequently, though the parties agree it doesn't happen very often, "just because of the nature of the thing," as the judge aptly expressed it. The record further shows that in such situations the Respondent has sometimes retained, and at other times changed the timing of the employee's next scheduled evaluation date. The freedom or authority to make choices, or the power "to judge or act" is by definition, "discretion."

Finally, I am perplexed by my colleagues apparent discomfort over my accurate reference to the judge's finding that the Union "specifically waived any objection or legal position it may have otherwise taken on the matter of merit increases" (majority at par. 7, supra, quoting the Administrative Law Judge at sec. IIIC, first paragraph). The majority then states, "The Union agreed to the Respondent's continuing exercise of its discretion in unilaterally determining the amount of each employee's merit increase based on his (or her) annual evaluation." Ibid. (Emphasis in majority.) Their statement is simply wrong – as the Union itself concedes. Rather, as detailed more fully below (see discussion of *American Mirror* and *Rochester Institute of Technology*, infra) what the Union demanded here was the "best of both worlds."

At the commencement of negotiations in 1989, the Respondent's chief negotiator stated to the Union's negotiating committee that the Respondent considered all future wage increases, including merit increases, to be bargainable issues; was considering whether these discretionary merit increases would be discontinued, and asked the Union what its position would be if they were to be discontinued. The Union's chief spokesman, Smith, the judge found stated that he considered the salary adjustment to be an existing condition of employment that the Respondent could not unilaterally discontinue, and further that the Respondent should continue granting merit increases during the negotiations. The Respondent then asked the Union if it would give the Respondent "credit" in the wage negotiations for any discretionary merit increases awarded during the negotiating process. The Union responded by indicating that the Union's wage proposals were always in the form of a minimum wage scale "which would most likely be above the current salary of the employees and that therefore how much the individual employee happened to be earning at the time the new wage scale was agreed upon" would not matter and thus did not agree that the discretionary merit increases would have any effect on the bargaining.

At the July 5, 1989 bargaining session, the Company announced that it was discontinuing discretionary merit wage increases. The Union advised the Company that the Union considered such a discontinuance to "constitute unlawful unilateral conduct." The judge found that the merit increase program of the Company has not been applied to unit employees since June 14, 1989, though it has been continued for non unit employees.

The majority adopts the conclusion of the judge that the Union, by orally indicating that the Respondent should continue the merit wage program, waived any objection it might have had to merit increases during negotiations. That, however, was neither the issue nor the question posed by the Respondent. Even though the parties had agreed to postpone the discussion of economic improvements until the latter stages of the negotiations, during the first negotiating meeting the Company inquired whether it would receive "credit" for any increases it might award pursuant to the merit increase program. The Union failed to answer that question in replying that any merit increases that were granted would not matter to the outcome of the wage negotiations.

At no point did the Respondent inquire whether the Union had any objection to the continuance of the merit pay program. The Union stated in response to the Respondent's question only that it viewed the program as a practice which could not be discontinued. Whether the Union waived any objections it might have to the continuation of the merit pay program is not controlling. That would only establish that the Respondent would have an affirmative defense to the granting of merit increases. Indeed, if the Respondent exercised its discretion not to grant increases that "waiver" would seem to require dismissal of the 8(a)(5) allegation.

Secondly, the judge seems to imply that the parties' agreement to defer economics until the latter stages of negotiations coupled with the Union's "waiver," constituted an agreement "to continue granting the discretionary merit increases as it would have done in the absence of

the Union." An agreement requires some semblance of a meeting of the minds of the contracting parties (not simply the charging party, General Counsel, and judge). The contrary is evident.

Thirdly, the Union's position was that this merit increase program was a practice which the Respondent could not unilaterally discontinue. The judge found, now joined by the majority, that even though the application of the merit pay program was purely discretionary the Respondent was required to continue it under Section 8(a)(5) protection. That finding, in my view, is not consistent with Board law.

The judge, and now the majority, relies on our decision in *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), to support its conclusion here. That case, however, involved an employer's established practice of providing annual increases, of the same percentage, given to all employees across the board at the same time. There is no evidence that the merit pay program here included any of those factors and thus I do not find that decision controlling here. Both *Anaconda Ericson, Inc.*, 261 NLRB 831 (1982), and *American Mirror Co.*, 269 NLRB 1091 (1984), were relied upon by the Respondent in support of its position. The judge, and my colleagues, conclude that those decisions are not controlling. The judge found that *Anaconda* was inapposite because there was no finding that the union had agreed that the employer should continue merit increases. Because I find no such agreement or waiver here, I do not agree that *Anaconda*, which dismissed this allegation of the complaint, can be disposed of so easily. Likewise, the judge here distinguished *American Mirror* on grounds that the "across-the-board

increases under consideration there varied as to the date of implementation and amount," and thus had no application to the situation present here. However, there is no dispute that the amount of increase here, if any, given individuals under the merit pay program varied widely among individuals depending on their performance and "his or her value to the newspaper" and were "totally discretionary." (ALJD sec. III,B.)

Accordingly, I find the Board's analysis in *Anaconda* and *American Mirror* persuasive. The amounts of the merit increases were purely discretionary. There was no evidence that the size or application of the merit increases was predetermined. I would adhere to the position taken by the judge in *American Mirror* when he said:

> What the Union wanted was a continuance of interim or past discretionary raises outside the contract negotiations. The Union, in other words, wanted the best of both worlds, and under the facts of this case I find that the Company had no legal duty to comply with the Union's request (at 1095). That is precisely what the Union sought here – the "best of both worlds."

I agree with this rationale. I find the Board's decisions in *Anaconda* and *American Mirror* to be controlling here. Accordingly, I would dismiss the complaint and dissent from my colleagues failure to follow this precedent.

Ann Weinman, Esq., for the General Counsel.

Thomas P. Burke, Jamie Johnson, and Thomas Petrides, Esqs. (Petitt & Martin), of Los Angeles, California, for the Respondent.

Ellen Greenstone, Esq. (Greenstore, Holquin, Garfield & Knox), of Los Angeles, California, for the Charging Party.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California on December 12 and 13, 1989. The initial charge was filed on July 11, 1989 by Los Angeles Newspaper Guild, The Newspaper Guild Local 69, AFL-CIO (the Union). Thereafter, on August 30, 1989, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by The Daily News of Los Angeles, a Division of Cooke Media Group, Inc. (Respondent), of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for the Union, and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the newspaper publishing business, and maintains its principal place of business in Woodland Hills, California, where it is engaged in printing and distributing its daily newspaper. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of $200,000, and annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of California.

It is admitted, and I find, that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act by discontinuing its past practice of granting annual wage increases to employees at the time of their annual performance evaluations.

B. *The Facts*

The facts are not in material dispute. On May 8, 1989 the Union was certified as the collective bargaining representative of certain of Respondent's employees in the following unit:

> All full-time and regular part-time editorial department employees employed by Respondent at its Woodland Hills, Glendale, Lancaster, Palmdale, Sacramento, Santa Clarita, Simi Valley, and Thousand Oaks, California and Washington, D.C. locations.

Since January 1, 1986, when the Respondent took over the operation of its predecessor, the Valley News, the Respondent has maintained the policy of its predecessor in annually evaluating the performance of each employee at the time of the employee's anniversary date, and submitting the performance review forms, together with any recommendation for a salary increase, to the the editor for final approval. The resulting salary increase, if any, is based on merit, and may range from no increase to a substantial increase depending upon the perceived efforts and ability of the employee, and his or her value to the newspaper. The amount of the increase, if any, is totally discretionary. As an example of the Respondent's general practice with regard to salary increases, the stipulated facts show that in 1986 there were 81 employees who received performance evaluations; 18.5 percent of these individuals received no increase, while the remaining employees received increases ranging from 2 to 20 percent. Generally, for the years 1986 to 1989, it appears that from about 40 to 50 percent of the unit employees receive increases from 3 to 5 percent.

Bargaining negotiations commenced on June 14, 1989. The parties agreed that they would negotiate the non-economic issues first, and then take up the economic issues. The Respondent's spokesman, Tom Burke, stated that the Respondent was considering whether to eliminate the merit increases, and asked what the Union's position would be on this issue. The Union's administrative officer, James Smith, stated that he considered the salary increases to be an existing condition of employment which the Respondent could not unilaterally discontinue, and that during the course of bargaining the Respondent should continue to grant the increases to employees, individually, on their anniversary dates. Burke said that the Respondent wanted to eliminate this practice because of the adverse economic effect it would have on the Respondent, and asked whether the Union would be willing to give credit to the Respondent if the practice was continued during the negotiations. Smith replied that, although the Union had not yet made a wage proposal, the Union's wage proposals were always in the form of a minimum pay scale which would most likely be above the current salary of the employees, and therefore it would not matter how much an individual employee happened to be earning at the time the wage scale was agreed upon. Thus Smith disagreed that the continuation of the Respondent's merit increase practice during the course of the bargaining negotiations would adversely affect the Respondent. Burke replied that the Respondent would continue to consider whether it would discontinue the increases during the course of bargaining.

At the bargaining session on July 5, 1989, Burke announced that the Respondent had decided to discontinue granting merit increases to the unit employees. Smith reiterated the Union's position, stated that he considered this to constitute unlawful unilateral conduct, and advised the Respondent that the Union would take appropriate action. To the date of the hearing, December 13, 1989, the parties have continued to bargain over non-economic proposals, and the negotiations have not yet advanced to the stage of wage negotiations.

The Respondent has continued, and is continuing, to issue annual performance appraisals to all of its employees. However, since about June 14, 1989, the Respondent has discontinued granting annual merit increases to its Editorial Department employees, while continuing to grant them to its non-represented employees.

C. *Analysis and Conclusions*

At the first negotiating session the Union advised the Respondent that it should continue granting merit increases during the course of bargaining as it had done in the past. In this manner the Union specifically waived any objection or legal position it may have otherwise taken on the matter of merit increases, and therefore, according to the positions taken by the Union and the General Counsel, the Respondent, after having agreed that the subject of economics, including wages, would be deferred to the latter stages of negotiations, was then required to continue granting the discretionary merit increases as it would have done in the absence of the

Union. The Respondent argues that it was privileged to discontinue the granting of discretionary merit increases.

In support of its position, the Respondent relies primarily on two Board cases, *Anaconda Ericson, Inc.*, 261 NLRB 831 (1982), and *American Mirror Co.*, 269 NLRB 1091 (1984). In *Anaconda Ericson*, unlike the instant case, the parties negotiated the issue of wages prior to the time the annual discretionary wage increases were customarily granted by the employer, and the union did not unconditionally agree that the employer should continue its past practice of granting wage increases during the course of negotiations. In *American Mirror*, unlike the instant case, there was no existing pattern of wage increases since the across-the-board wage increases the employer elected to periodically grant varied as to date and amount. Moreover, the parties did not defer the negotiation of wages, but rather the employer took the position that any wage increases which would be granted were then "on the table" for negotiation.

The record evidence establishes that the Respondent had instituted a pattern and practice of evaluating the unit employees at the time of each employee's anniversary date, and that as a result of such evaluation the Respondent would grant a discretionary merit salary increase to the employee in an amount commensurate with the employee's evaluation; and further, that the employees were fully aware of the Respondent's practice in this regard, and had come to expect that their salary would be adjusted in this manner at the time of each employee's anniversary date. Moreover, at the commencement of bargaining, the parties agreed to postpone the negotiation of salaries until after the non-economic

contract items had been negotiated, and the Union had specifically requested that the Respondent continue with its customary aforementioned practice of granting salary increases. Under these circumstances, it appears that the Board's recent decision in *Central Maine Morning Sentinel*, 295 NLRB 376 (1989), is controlling herein. In finding a violation of Section 8(a)(5) of the Act, the Board stated as follows:

> The judge found, and we agree, that the Respondent had an established practice of granting an annual wage increase to all its employees not covered by a collective bargaining agreement. The editorial employees in this case who had selected the Union as their bargaining representative remained within this class following certification and the onset of contract negotiations, and therefore reasonably expected that the wage increase would continue to be part of their ongoing conditions of employment, at least until an initial collective-bargaining agreement was in place to establish a wage scale independent of the Respondent's past practice, or until the parties had bargained to impasse about changing these conditions. Neither event occurred here. [footnote omitted.]

While the Respondent would distinguish the instant case from *Central Maine Morning Sentinel*, on the basis that the annual wage increases in *Central Maine Morning Sentinel* were granted to all employees at the same time and each employee's wages was increased by the same percentage, that distinction does not mandate a different disposition of the issue. Thus, as in the instant case, when there is a well-established pattern of granting wage increases to

employees who have come to expect an annual evaluation together with a salary increase commensurate with the results of that evaluation, it would seem of no material significance that all employees were not evaluated simultaneously, or that their evaluations were not identical. See *General Motors Acceptance Corp.*, 196 NLRB 137 (1972); *Allied Products Corp.*, 218 NLRB 1246 (1975), enf. 548 F2d 644 (6th Cir. 1977); *Rochester Institute of Technology*, 264 NLRB 1020 (1982), enf. denied on other grounds, 724 F2d 9 (2d Cir. 1983).

On the basis of the foregoing, I find that the Respondent has violated, and is violating, Section 8(a)(5) of the Act as alleged.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive bargaining representative of Respondent's employees in the following appropriate unit:

> All full-time and regular part-time editorial department employees employed by Respondent at its Woodland Hills, Glendale, Lancaster, Palmdale, Sacramento, Santa Clarita, Simi Valley, and Thousand Oaks, California and Washington, D.C. locations.

4. By unilaterally withholding wage increases from employees the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has failed to bargain in good faith with the Union by withholding wage increases to which bargaining unit employees were entitled, I shall recommend that the Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including the posting of an appropriate notice attached hereto as "Appendix."

Since the Respondent has been found to have withheld wage increases to which bargaining unit employees were entitled and would have received but for the Respondent's unilateral conduct in violation of Section 8(a)(5) of the Act, I shall recommend that each of the affected employees in the bargaining unit described above be made whole for the increases they would have received from the date such increases were discontinued, apparently on about June 14, 1989, by payment to them of the difference between their actual wages and the wages they would have otherwise received. The amount shall be computed on a quarterly basis in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, The Daily News of Los Angeles, a Division of Cooke Media Group, Inc., Woodland Hills, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by unilaterally withholding annual merit wage increases from employees in the appropriate unit represented by Los Angeles Newspaper Guild, The Newspaper Guild Local 69, AFL-CIO.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Make whole the employees in the appropriate unit for any monetary losses they may have suffered by reason of Respondent's unilateral withholding of annual wage increases which the employees would have received in the manner set forth above in the remedy section of this decision.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its various facilities copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by a duly authorized representative, shall be posted by the Respondent immediately after receipt thereof, and be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally withhold any merit wage increases from you to which you may have been entitled as a result of your annual evaluations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them as set forth in Section 7 of the Act.

WE WILL bargain in good faith with the Los Angeles Newspaper Guild, The Newspaper Guild Local 69, AFL – CIO, as the exclusive representative of our employees in the following appropriate unit:

> All full-time and regular part-time editorial department employees employed by Respondent at its Woodland Hills, Glendale, Lancaster, Palmdale, Sacramento, Santa Clarita, Simi Valley, and Thousand Oaks, California and Washington, D.C. locations.

WE WILL make whole the employees in the above appropriate unit for any monetary losses they may have

suffered by reason of our unilateral withholding of the annual wage increases they would have received.

THE DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1047 **September Term, 1995**

Daily News of Los Angeles, a Division
of Cooke Media Group, Inc.,
Petitioner

v.

National Labor Relations Board,
Respondent

Los Angeles Newspaper Guild,
Local 69, AFL-CIO,
Intervenor

BEFORE: Edwards, Chief Judge, Henderson, and Rogers, Circuit Judges

ORDER

(Filed Jul. 9, 1996)

Upon consideration of petitioner's petition for rehearing filed March 1, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1047 **September Term, 1995**

Daily News of Los Angeles, a Division
of Cooke Media Group, Inc.,
Petitioner

v.

National Labor Relations Board,
Respondent

Los Angeles Newspaper Guild,
Local 69, AFL-CIO,
Intervenor

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

(Filed Jul. 9, 1996)

Upon consideration of petitioner's Suggestion for Rehearing *In Banc*, the response thereto and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

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(2)

Supreme Court, U.S.
FILED
DEC 12 1996
CLERK

No. 96-576

In the Supreme Court of the United States

OCTOBER TERM, 1996

THE DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that an established, merit-based wage increase program, which is fixed both as to its timing and eligibility criteria, but discretionary as to amount, is a term or condition of employment that the employer cannot unilaterally change without first bargaining with the union.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-576

THE DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 73 F.3d 406. The supplemental decision and order of the National Labor Relations Board (Pet. App. 29a-58a) is reported at 315 N.L.R.B. 1236. The earlier opinion of the court of appeals remanding the case to the Board for reconsideration (Pet. App. 59a-75a) is reported at 979 F.2d 1571. The initial decision and order of the Board and the decision of the administrative law judge (Pet. App. 76a-98a) are reported at 304 N.L.R.B. 511.

JURISDICTION

The court of appeals entered its judgment on January 19, 1996. A petition for rehearing was denied on July 9, 1996. Pet. App. 99a-100a. The petition for a writ of certiorari was filed on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1986, petitioner assumed operational control of a daily newspaper, which it had purchased from the Valley News. Petitioner continued its predecessor's policy of annually evaluating the performance of each editorial department employee and using that performance review as the basis for increasing salaries. Pet. App. 4a. While the amount of the increase was discretionary, the sole criterion for determining the amount of the increase was merit. *Ibid.* The vast majority of eligible employees received some raise each year. For example, in 1986, 81.5% of the employees who received performance evaluations received merit raises; in 1987, 82.7% received merit raises; and in 1988 and the first five months of 1989, 89% received merit raises. *Ibid.*

On May 8, 1989, the Board certified the Los Angeles Newspaper Guild, Local 69, AFL-CIO (Guild), as the collective bargaining representative for all of petitioner's full-time and regular part-time editorial department employees in Washington, D.C., and at eight California locations. At the commencement of negotiations, the parties agreed to defer bargaining on economic issues until all non-economic issues had been resolved. Petitioner's negotiator also stated that, pending negotiations, petitioner was considering discontinuing the annual employee merit raises. The

Guild responded that it considered the merit-based wage increase program to be an existing condition of employment that petitioner could not unilaterally discontinue and that, during the course of bargaining, petitioner should continue to grant the increases to all employees on their anniversary dates. Pet. App. 5a. Shortly thereafter, petitioner terminated merit-based wage increases for employees who were part of the collective bargaining unit, although it did continue to issue annual performance appraisals for all employees. *Ibid.* At least two unit employees were subsequently informed at their annual performance appraisals that, based on their performance, they would have received increases but for the union negotiations. *Id.* at 5a-6a. Petitioner also continued to grant merit-based wage increases to those employees outside of the collective bargaining unit. *Id.* at 6a.

2. The Guild filed a complaint with the Board, which issued a decision and order on August 27, 1991. Pet. App. 76a-98a. The Board found that the merit-based wage increase program, although discretionary as to the precise amount of each individual increase, had nevertheless become a fixed term or condition of employment, which, under *NLRB* v. *Katz*, 369 U.S. 736 (1962), could not be discontinued without either the prior agreement of or bargaining with the Guild. Pet. App. 77a-78a. The Board concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by unilaterally withholding the annual merit increases from the unit employees. The Board ordered petitioner to cease and desist from that unfair labor practice and to make the employees whole for any monetary losses sustained because of petitioner's unlawful conduct. Pet. App. 80a, 94a.

The court of appeals remanded for further explanation and consideration of the Board's decision. In particular, the court directed the Board to reconcile its ruling with the Board's earlier decision in *Anaconda Ericsson Inc.*, 261 N.L.R.B. 831 (1982), and to clarify its interpretation of this Court's decision in *Katz*. Pet. App. 59a-71a.[1]

3. a. On December 31, 1994, the Board issued a supplemental decision holding that, under *Katz*, any unilateral change covering a mandatory subject of bargaining is unlawful regardless of the nature of the change or the particular term or condition affected. Pet. App. 33a-37a. The Board further noted that it had consistently applied *Katz* to find the unilateral discontinuance of merit raises to be unlawful whenever such raises had become established terms or conditions of employment. *Id.* at 40a-44a. Because *Anaconda Ericsson* could not be reconciled with other Board decisions, the Board overruled it. *Id.* at

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[1] The court also invited the Board to address on remand how the back pay remedy would be administered and whether the prohibition on wage and benefit decreases during negotiations was consistent with *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), and *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965). Pet. App. 72a-75a. On remand, the Board concluded that the back pay due employees could be approximated based on available information. *Id.* at 48a-50a. The Board further concluded that *Insurance Agents* and *American Ship* were inapposite because petitioner's unilateral change in a term or condition of employment was a violation of the duty to bargain and, thus, could not be a lawful economic weapon. *Id.* at 50a-56a. The court of appeals affirmed the Board's ruling on those issues (*id.* at 19a-23a), and petitioner does not challenge those rulings here.

47a. The Board reaffirmed its finding of a violation and its prior remedial order. *Id.* at 56a-57a.

b. The court of appeals affirmed the Board's supplemental decision and enforced its order. Pet. App. 1a-28a. The court found that substantial evidence supported the Board's finding that, despite the discretionary amounts of salary increases, petitioner's merit-based wage increase program was "constrained both by the established procedures for evaluating employees and by the fixed criteria for making each individual merit decision." *Id.* at 13a. Petitioner thus "had instituted a pattern and practice of evaluating the unit employees at the time of each employee's anniversary date, and * * * as a result of such evaluation the [Company] would grant a discretionary merit salary increase to the employee in an amount commensurate with the employee's evaluation." *Ibid.* (emphasis omitted). The court concluded that "when the criteria for determining discretionary wage increases are fixed * * * *Katz* demands that the Company continue to apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously." *Id.* at 14a.

Judge Henderson dissented because, in her view, the annual increases were entirely discretionary and thus did not constitute "a 'fixed' term of employment or give employees any bankable expectations." Pet. App. 27a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is thus not warranted.

1. a. Petitioner contends (Pet. 7-14) that the court of appeals' ruling conflicts with this Court's decision in *NLRB* v. *Katz*, 369 U.S. 736 (1962). The National Labor Relations Act requires employers "to bargain collectively" and "in good faith" with employee representatives over "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(a)(5) and (d). In *Katz*, this Court held that an employer violates that duty by unilaterally changing a term of employment with respect to a mandatory subject of bargaining during the course (or in the absence) of negotiations. 369 U.S. at 743. Such unilateral action "amount[s] to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Id.* at 747. Accordingly, the Court ruled in *Katz* that the employer had violated the Act by granting, without notice to the union, merit increases to nearly half of its unit employees:

> Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the

> procedures and criteria for determining such increases.

Id. at 746-747.

The court of appeals' decision fully comports with *Katz*.[2] Petitioner unilaterally changed an established component of the employees' existing wage structure, while preserving it for non-union employees. True, *Katz* involved an addition to, rather than the termination of, existing benefits. But the operative concern in both cases is that the employer has unilaterally *changed* the existing conditions of employment without first bargaining with the employees' representative. Under *Katz*, "unilateral change"—not just unilateral change in a particular direction—violates the duty to bargain collectively and in good faith. 369 U.S. at 743. In both instances, the employer's action "is a circumvention of the duty to negotiate which frustrates the objectives of [the Act]." *Ibid.*; see also *id.* at 746-747 (distinguishing case where employer had already committed itself to providing raises); *Hyatt Corp.* v. *NLRB*, 939 F.2d 361, 370-371 (6th Cir. 1991) ("The focus of the inquiry, therefore, is on the existence of an established practice or status quo."); *Aaron Bros. Co.* v. *NLRB*, 661 F.2d 750, 753 (9th Cir. 1981); *NLRB* v. *Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970).[3]

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[2] Because petitioner's merit-based wage increase program involved employee wages, petitioner does not dispute that it was a mandatory subject of bargaining.

[3] Contrary to petitioner's contention (Pet. 13-14), the court of appeals' interpretation of *Katz* does not turn on whether the union wants the discretionary increases to continue or stop, but on whether the timing and criteria for awarding the discretionary increases are sufficiently fixed to be viewed by the em-

As the court of appeals found (Pet. App. 3a-4a, 12a-14a), substantial evidence supports the Board's determination that the merit-based wage increase program was an established part of petitioner's wage structure and thus could not be changed without bargaining. The program had been in place for numerous years and even predated petitioner's assumption of control over the paper. The policy has continued in effect for non-union employees. *Id.* at 6a.[4] The timing of the evaluation and the criteria dictating the size (if any) of a wage increase were established.[5] Employees "knew that they would receive annual merit increases based on an evaluation of their work: increases were denied *only* when an employee's evaluation was unsatisfactory (or when an employee was already at the top of the salary scale)." *Id.* at 14a; see also *id.* at 14a n.4 ("[U]nequivocal evidence in the record indicates that, prior to the Company's discontinuance of the merit-increase policy, a positive performance evaluation invariably corresponded to some form of wage increase."). The fact that the program contained a single discretionary component, regarding the amount of the wage increase, did not strip it of its status as an

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ployees as part of the established wage structure, and thus as a term or condition of their employment. In *Katz*, the merit increases could not be viewed as a term or condition of employment because they were entirely discretionary, whereas in this case the merit increases were sufficiently fixed to be viewed as part of the existing wage structure.

[4] Cf. *Dothan Eagle*, 434 F.2d at 99 ("Such discrimination between union and non-union personnel cannot be tolerated.").

[5] Petitioner's editor testified that, in general, no factors other than performance were considered by petitioner in calculating raises. Pet. App. 18a.

established wage program and thus a mandatory subject of bargaining. See *Hyatt*, 939 F.2d at 369.

Petitioner's alleged conflict with *Katz* thus depends upon a factual characterization of the wage increase program (as entirely discretionary) that the administrative law judge, the Board, and the court of appeals each rejected. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The task of evaluating whether an agency's decision is supported by substantial evidence belongs "primarily" to the court of appeals: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Accordingly, further review is not warranted.

b. The court of appeals' decision, moreover, is consistent with the rulings of other courts of appeals. See *Pegasus Broadcasting of San Juan, Inc.* v. *NLRB*, 82 F.3d 511, 512 (1st Cir. 1996) (alteration in established practice of providing merit-based salary increases prohibited, expressly following court of appeals' decision in this case); *Litton Microwave Cooking Prods.* v. *NLRB*, 949 F.2d 249, 252-253 (8th Cir. 1991) (discontinuation of merit-based wage increases violated Act), cert. denied, 503 U.S. 985 (1992); *Hyatt*, 939 F.2d at 369 ("The fact that a wage or merit increase is partly discretionary does not give an employer carte blanch[e] to forgo the increase.").[6]

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[6] Petitioner's claim (Pet. 14-16) that the court of appeals' decision conflicts with the rulings of other circuits is mistaken.

2. There is likewise no merit to petitioner's contention (Pet. 17-20) that the court of appeals' decision impermissibly forces concessions on a bargainable issue, contrary to *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952). See also 29 U.S.C. 158(d). First, petitioner did not raise that argument below, nor did the court of appeals address it. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

In any event, nothing in the Board's order (Pet. App. 94a-95a), or the court's decision enforcing it, imposes any limitation on the position petitioner may take regarding merit increases in any future bargaining. If petitioner sought agreement on a contract clause terminating the merit increases, bargained to impasse on that clause, and then implemented its terms, it would violate no provision of the Board's

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In *Phelps Dodge Mining Co.* v. *NLRB*, 22 F.3d 1493 (10th Cir. 1994), every aspect of the payments in issue—timing, amount, selection of employees to receive them, and manner of calculation—was discretionary. *Id.* at 1496-1498 & n.3. The employees thus had no "reasonable expectation[]" of receiving the payments, which were more appropriately characterized as "discretionary gifts rather than wages." *Id.* at 1498. *NLRB* v. *Nello Pistoresi & Son, Inc.*, 500 F.2d 399 (9th Cir. 1974), involved Christmas bonuses, not established wage increases, the short history and indefinite nature of which precluded any established expectation of remuneration. *Id.* at 400-401. Finally, in both *NLRB* v. *Rochester Institute of Technology*, 724 F.2d 9 (2d Cir. 1983), and *Roper Corp.* v. *NLRB*, 712 F.2d 306 (7th Cir. 1983), the employers had fulfilled their obligation to bargain before discontinuing merit increases. *Rochester*, 724 F.2d at 11-12; *Roper*, 712 F.2d at 309-311.

order. The court's ruling only prohibits petitioner from *unilaterally* eliminating merit increases and requires it to compensate employees for losses due to unilateral action already taken. Neither of those requirements compels a "concession" by petitioner. Rather, both relate to the process, rather than the substantive outcome, of collective bargaining, and this Court has recognized the Board's authority to supervise that process. See *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1996

Supreme Court, U.S.
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No. 96-576

In The

Supreme Court of the United States

October Term, 1996

THE DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

In its brief in opposition, Respondent The National Labor Relations Board (the "Board") carefully avoids addressing the central issue raised in Petitioner The Daily News of Los Angeles, a Division of Cooke Media Group, Inc.'s (the "Daily News") Petition for Writ of Certiorari, namely whether wage increases given or withheld in amounts which the Board itself found to be "totally discretionary" can logically be held to be an established condition of employment under this Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1964), where *Katz* specifically held that such discretionary increases are not an established condition of employment. 88a.

The Daily News also seeks review on the basis that the court of appeals' decision impermissibly forces concessions on a bargainable issue. The Board's brief in opposition mistakenly asserts that the Daily News failed to raise this issue to the court of appeals, and misrepresents to the Court that the Daily News has raised this issue for the first time in its petition. In fact, the issue was squarely raised to the court of appeals in the opening brief the Daily News filed with that court.[1]

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[1] Appended hereto, beginning at appendix page 1aa, are excerpts from the opening brief filed with the court of appeals wherein this issue was addressed to that court.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH KATZ'S HOLDING THAT DISCRETIONARY INCREASES ARE NOT AN ESTABLISHED CONDITION OF EMPLOYMENT.

The Board's opposition attempts to minimize the fundamental inconsistency of the court of appeals' decision with *Katz* by arguing that "the alleged conflict with *Katz* thus depends upon a factual characterization of the wage increase (as entirely discretionary) that the administrative law judge, the Board, and the court of appeals each rejected," and concluding that a writ of certiorari is "not warranted" simply to review a finding of fact. (Opp. Brief, page 9.) This is a misstatement of the case, as there is no factual dispute as to the degree of discretion exercised by the Daily News over the amounts of the increases. Rather, the degree of discretion exercised by the employer here is undisputed and indistinguishable from that exercised by the employer in *Katz* itself. The uncontested finding of the Administrative Law Judge here, in contrast to the characterization contained in the Board's brief, is as follows:

> The resulting salary increase, if any, is based on merit, and may range from no increase to a substantial increase depending upon the perceived efforts and ability of the employee, and his or her value to the newspaper. *The amount of the increase, if any, is totally discretionary*. 88a (emphasis provided).

This finding that the amount of the increase, if any, was "totally discretionary" was not contested by the Board, and may not now be placed in issue by misrepresenting

the facts and the Administrative Law Judge's findings in their brief.[2]

In contrast to the assertion in its present brief, the Board itself found that the increases, if any, were "totally discretionary" in amount. The sole element over which there is any factual dispute is whether the timing of the increases was fixed, an element which is inconsequential to the legal issue raised by the Daily News's petition. *Katz* itself rejected the argument advanced by the employer that the regular timing of the increases, the Company's "long-standing practice of granting quarterly or semiannual merit reviews" rendered the increases an established condition of employment. 369 U.S. at 746. If regular timing could not render discretionary increases an established condition in *Katz*, they logically may not do so here. *Katz* held that where an employer exercised discretion over the amount of increases, those increases did not constitute an established condition of employment, even if the timing were arguably regular and fixed. *Id.* Indeed, the Board recognizes that "[i]n *Katz*, the merit increases could not be viewed as a term and condition of employment because they were entirely discretionary," but argues that the raises herein "were sufficiently fixed to be viewed as a part of the existing wage structure." (Opp. Brief, pp. 7-8, n.3) What the Board has failed to do, however, is distinguish the raises herein from those at issue in *Katz* on any principled basis. In *Katz*, the Board

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[2] Indeed, the court of appeals in its first decision remanded this matter to the Board for "consideration of whether an employer is bound under *Katz* to persist in a merit raise program that is entirely discretionary as to amount." 71a.

points out that the size of the increases were "entirely discretionary." How does that differ from the undisputed finding of the Administrative Law Judge that "the amount of the increase, if any, is totally discretionary?" 88a. As noted above, *Katz* rejected the argument that the fixed timing of the employer's increases rendered them an established condition of the employer. The Board's argument misses the mark entirely when it asserts that "a single discretionary component, regarding the amount of the wage increase [if any], did not strip it of its status as an established wage program." (Opp. Brief, pp. 8-9.) For it was precisely the employer's discretion over this "component," i.e. the amount of increases, which *Katz* found precluded these increases from being an established wage program. "[T]he raises here were in no sense automatic, but were informed by a large measure of discretion." 746 U.S. at 746. *Katz* held that an employer's exercise of a "large measure" of discretion over the amount of the increases precluded the employer from arguing that their continuation was necessary to continue the status quo. This "large measure" of discretion exercised in *Katz* is not appreciably different from the "totally discretionary" raises at issue here.

The issue is not whether a unilateral change can occur by granting or by failing to grant increases as the Board suggests, but whether the status quo conditions of employment are preserved or altered by the continued granting of discretionary increases. In *Katz*, this Court held that the status quo was altered by the employer's granting of discretionary increases. The court of appeals below holds precisely the contrary, that discretionary increase must be granted (if the union demands it) in

order to maintain the status quo. Under the court of appeals' decision, the employer's duty to maintain existing conditions of employment is defined by the union's bargaining demand, not the discretion exercised by the employer. Certiorari should be granted to give the Court the opportunity to hear further argument and correct the erroneous application of *Katz* below.

II. THE DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THOSE OF OTHER CIRCUITS ON THIS ISSUE.

The Board's brief suggests that the courts of appeals have reached uniform results on similar cases. Unlike the court of appeals below, the Board actually cites to the Tenth Circuit's decision in *Phelps Dodge Mining Co. v. NLRB*, 22 F.3d 1493 (10th Cir. 1994), but attempts to distinguish it on a factual basis. *Phelps*, however, remains antithetical to the court's decision below. *Phelps* specifically notes that "[p]ayments to employees which are fixed as to timing but discretionary in amount do not become part of the employees' reasonable expectations and thus are not considered 'terms and conditions' of employment," a result directly contrary to that reached here. 22 F.3d at 1496.

The Board's attempt to distinguish *NLRB v. Nello Pistoresi & Son, Inc.*, 500 F.2d 399 (9th Cir. 1974), on the basis that discretionary bonuses, rather than raises, were at issue is uncompelling, since the engine of analysis for both bonuses and increases is *Katz*, which focuses on the exercise of discretion, not the form of compensation. 500

F.2d at 400-01. Similarly, the Board's attempt to distinguish *Roper Corp. v. NLRB*, 712 F.2d 306 (7th Cir. 1983), and *NLRB v. Rochester Inst. of Technology*, 724 F.2d 9, 12 (2nd Cir. 1983) is also unconvincing. The Board argues that in these two cases "the employers fulfilled their obligation to bargain before discontinuing [discretionary] merit increases." (Opp. Brief, pp. 9-10, n.6.) Yet in neither case did the employer reach agreement or impasse, a condition the Board expressly imposes here, and the Board makes no effort to explain the difference, if any, between the level of bargaining by the Daily News here, which was fairly extensive, and the bargaining in those two cases.[3]

III. THE BOARD'S IMPERMISSIBLE FORCING OF BARGAINING CONCESSIONS UPON THE DAILY NEWS WAS RAISED BEFORE THE COURT OF APPEALS BELOW.

The Board argues that there is "no merit" to the Daily News's argument that the court of appeals' decision forces bargaining concessions upon it, misrepresenting to this Court that "petitioner did not raise that argument below." (Opp. Brief, p. 10.) In fact, the issue was addressed directly to the court of appeals below.

One of the seven "Issues Presented" to the court of appeals in the Daily News's opening brief was:

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[3] The Daily News raised the issue during at least two bargaining sessions, and engaged in fairly extensive discussions. These negotiations are recounted in the Administrative Law Judge's opinion. 88a-90a.

> Whether the National Labor Relations Board's supplemental decision and order would impermissibly intrude on the employer's legitimate economic weapons, by forcing economic concessions on discretionary and bargainable increases, in a manner inconsistent with the National Labor Relations Act and Supreme Court precedent? 3aa.[4]

An argument heading in that same brief was captioned "The Board's Proposed Remedy is Inconsistent with Katz, and Would Force Economic Concessions by the Employer." 3aa. Therein, the Daily News argued, "[t]he Board's remedy . . . would simply implement the Guild's bargaining demand. . . . The Board does not have the power to impose substantive terms on the parties: 'it is equally clear that the Board may not, either directly or indirectly, compel concessions' upon parties to collective bargaining," citing *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). 5aa. For the Board to now represent to this Court that the Daily News did not raise this issue before the court of appeals is preposterous.

Although the issue was raised by the Daily News, the court of appeals failed to address it, as the Board's brief acknowledges. The court of appeals' failure to address this important issue makes the granting of this petition even more urgent. The Board's attempt to address this issue in its brief is wholly inadequate.

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[4] The Daily News' Opening Brief to the court of appeals is included in the supplemental appendix hereto, beginning at page 1aa.

The Board argues that because the Daily News could subsequently bargain to impasse, and then terminate merit increases, no concession has been forced. This, of course, could be said of any substantive term which the Board might choose to impose, were that power not expressly forbidden.[5] The Board does not dispute that under the present ruling, a union can either demand that increases be continued, or can insist that they be discontinued under *Katz*. The Board does not dispute that the present decision compels an employer to implement that bargaining demand. *Katz* held that discretionary increases are **not** a part of the status quo, but rather are bargainable issues. Consistent with that holding, a union is given the right to choose its bargaining demand regarding the subject of discretionary increases, and yet the present decision, when coupled with *Katz*, forces the employer to agree to whichever demand the union makes.[6] The fact that an employer can subsequently try, through bargaining, to take back the concession compelled by the Board does not alter the fact that a concession has been forced in the first instance.

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[5] For example, if the Board imposed a 50% wage increase, the employer would have the right to bargain to impasse, then eventually implement a corresponding wage cut. The Board's argument that no concession has been forced is absurd. Moreover, reaching impasse can be a long and tedious process. Here, the parties bargained for 18 months without reaching impasse.

[6] The fact that, under the court of appeals' decision, the union's demand to continue or discontinue increases defines the employer's obligation under *Katz* to maintain the status quo only underscores the fundamental contradictions underlying the court of appeals' decision.

CONCLUSION

The decision of the court of appeals conflicts with this Court's own decisions, and the decisions of other courts of appeals. The Petition for Writ of Certiorari should therefore be granted.

Respectfully submitted,

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Excerpts from the Opening Brief of the Daily News of Los Angeles to the Court of Appeals Below

Oral Argument: November 6, 1995

NO. 95-1047

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE DAILY NEWS OF LOS ANGELES,
A DIVISION OF COOKE MEDIA GROUP, INC.,

Petitioner/Cross-Respondent,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

LOS ANGELES NEWSPAPER GUILD,
LOCAL 69, AFL-CIO,

Intervenor.

PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

OPENING BRIEF OF PETITIONER/ CROSS-RESPONDENT THE DAILY NEWS OF LOS ANGELES

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* * *

II. ISSUES PRESENTED.

* * *

4. Whether the National Labor Relations Board's supplemental decision and order would impermissibly intrude on the employer's legitimate economic weapons, by forcing economic concessions on discretionary and bargainable increases, in a manner inconsistent with the National Labor Relations Act and Supreme Court precedent?

* * *

F. THE BOARD'S DECISION IS BASED ON AN ERRONEOUS VIEW OF THE LAW, AND IS INCOMPATIBLE WITH THE NLRA.

1. The Board's Proposed Remedy is Inconsistent With Katz, and Would Force Economic Concessions By the Employer.

In remanding this matter, the Court asked the Board to "address the consistency of the remedy (if any) with the reasoning of *Katz*." 979 F.2d at 1578. *Katz* held that

where past increases "were informed by a large measure of discretion," there "is simply no way . . . for a union to know whether or not there has been a substantial departure from past practice" when increases are given. 369 U.S. at 746. Because past increases here were "totally discretionary" in nature, the Court reasoned that the Board's proposed remedy to pay employees "the difference between their actual wages and the wages they would have received" was impossible since under *Katz*, "the latter by hypothesis are unascertainable." *Daily News*, 979 F.2d at 1577.

Under the Employer's policy, an individual's increase "may range from no increase to a substantial increase," and the "amount of the increase, if any, is totally discretionary." (PA: 76.) Given this degree of discretion, the proposed remedy is unworkable, as there is no way to determine what wages employees "would have received." As the dissent in *DNLA I* noted, "Indeed, if the Respondent exercised its discretion not to grant increases," then the Guild's alleged waiver "would seem to require dismissal of the 8(a)(5) allegation." 304 N.L.R.B. at 513 (Oviatt, dissenting).

The Board's response to the serious questions which the Court and one of its previous members raised over the viability of the remedy is to dismiss them as mere "pessimism." 315 N.L.R.B. at 1241. The Board proposes to examine "the amounts of the merit increases awarded to the editorial employees during the years prior to their discontinuance" and use them "to construct a formula" for subsequent raises. *Id.*

The Board's remedy would eviscerate the central feature of the program, which was the wholly discretionary nature of the raises. Raises, if given at all, varied widely between years and between individuals, and did not conform to performance ratings. (PA: 180, 312-313, 333-335.) There is no "formula" which can approximate increases since they were discretionary. The Board's remedy, rather than preserve the status quo, would simply implement the Guild's bargaining demand that raises be non-discretionary: "if currently an employee gets four percent, they should not get one percent." (PA: 225.) The Board does not have the power to impose substantive terms on the parties: "it is equally clear that the Board may not, either directly or indirectly, compel concessions" upon parties to collective bargaining. *N.L.R.B. v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Because the Board's remedy would compel concession to the Guild's demand, its order cannot be enforced.

* * *